Supreme Court, U.S.
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No. 03-724

IN THE

Supreme Court of the United States

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., *et al.*,

Petitioners,

v.

EMPAGRAN, S.A., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The District of Columbia Circuit, in a divided opinion, interpreted the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, to permit U.S. antitrust claims by foreign buyers based on transactions with foreign sellers conducted entirely in foreign countries. Rehearing was denied by a 4-3 vote. The D.C. Circuit's decision conflicts with decisions of other courts of appeals and with the views of the United States. The question presented is as follows:

Whether plaintiffs may pursue Sherman Act claims seeking recovery for injuries sustained in transactions occurring entirely outside U.S. commerce.

PARTIES TO THE PROCEEDINGS BELOW

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioners: F. Hoffmann-La Roche Ltd, Hoffmann-La Roche Inc., Roche Vitamins Inc., BASF AG, BASF Corporation, Rhône-Poulenc Animal Nutrition Inc., Rhône-Poulenc Inc., Hoechst Marion Roussel S.A., Rhône-Poulenc S.A., Takeda Chemical Industries, Ltd., Takeda Vitamin & Food USA, Inc., Daiichi Pharmaceutical Co., Ltd., Daiichi Pharmaceutical Corp., Daiichi Fine Chemicals, Inc., Eisai Co., Ltd., Eisai U.S.A., Inc., Eisai Inc., Akzo Nobel Chemicals B.V., Akzo Nobel Inc., Bioproducts Incorporated, Chinook Group Ltd., Cope Investments Ltd., Degussa AG, Degussa Corp., DuCoa, L.P., DCV, Inc., EM Industries, Inc., Merck KGaA, E. Merck, Lonza Inc., Lonza AG, Alusuisse-Lonza Group Ltd, Mitsui & Co., Ltd., Nepera, Inc., Reilly Chemicals, S.A., Reilly Industries, Inc., Sumitomo Chemical Co., Ltd., Sumitomo Chemical America, Inc., Tanabe U.S.A. Inc. and UCB Chemicals Corp.

Respondents: Empagran, S.A., Nutricion Animal, S.A., Winddridge Pig Farm, Brisbane Export Corp. Pty, Ltd. and Concern Stirol, on behalf of themselves and all others similarly situated.

RULE 29.6 STATEMENT

F. Hoffmann-La Roche Ltd is a wholly-owned subsidiary of Roche Holding Ltd. Novartis AG, a publicly-held company, owns approximately 32.7% of the voting shares of Roche Holding Ltd. Novartis AG has no representation on Roche Holding Ltd's board of directors and does not in any way control Roche Holding Ltd or any of its subsidiaries. Apart from Roche Holding Ltd (and, indirectly, Novartis

AG), there is no publicly-held company with a 10% or greater ownership interest in F. Hoffmann-La Roche Ltd.

Hoffmann-La Roche Inc. ("HLRI") and Roche Vitamins Inc. ("RVI") are indirect subsidiaries of Roche Holding Ltd. Apart from Roche Holding Ltd (and, indirectly, Novartis AG), there is no publicly-held company with a 10% or greater ownership interest in HLRI or RVI.

No publicly-held company has notified BASF Aktiengesellschaft ("BASF AG") that it owns a 10% or greater interest in BASF AG.

Apart from BASF AG, there is no publicly-held company that owns a 10% or greater interest in BASF Corporation.

Aventis Animal Nutrition Inc. (f/k/a Rhône-Poulenc Animal Nutrition Inc.) and Aventis CropScience USA Inc. (f/k/a Rhône-Poulenc Inc.) are wholly-owned indirect subsidiaries of Rhône-Poulenc S.A. ("RPSA"), n/k/a Aventis SA, which is a publicly-traded holding company. Hoechst Marion Roussel S.A. is a wholly-owned indirect subsidiary of Hoechst A.G. RPSA, n/k/a Aventis SA, owns substantially all of the outstanding shares of Hoechst A.G. Apart from RPSA, n/k/a Aventis SA, there is no publicly-held company with a 10% or greater ownership interest in Aventis Animal Nutrition Inc., Aventis CropScience USA Inc. or Hoechst Marion Roussel S.A.

Takeda Chemical Industries, Ltd. ("TCI") has no parent company, and to the best of its knowledge there is no publicly-held company with a 10% or greater ownership interest in TCI.

Takeda Vitamin & Food USA, Inc. ("TVFU") was a wholly-owned subsidiary of Takeda America, Inc., now known as Takeda America Holdings, Inc., which in turn is a subsidiary of TCI. TVFU was merged into BASF Corporation as of approximately January, 2001.

Daiichi Pharmaceutical Co., Ltd. is the direct parent of Daiichi Pharmaceutical Corp. and the indirect parent of Daiichi Fine Chemicals, Inc. There is no publicly-held company with a 10% or greater ownership interest in Daiichi Pharmaceutical Co., Ltd.

Daiichi Pharmaceutical Corp. is a subsidiary of Daiichi Pharmaceutical Co., Ltd. Daiichi Pharmaceutical Corp. has no outstanding securities in the hands of the public. Daiichi Pharmaceutical Corp. was prior to October 2002 the parent of Daiichi Fine Chemicals, Inc.

Daiichi Fine Chemicals, Inc. was prior to October 2002 a direct subsidiary of Daiichi Pharmaceutical Corp., which in turn is a subsidiary of Daiichi Pharmaceutical Co., Ltd. Daiichi Fine Chemicals, Inc. has no outstanding securities in the hands of the public.

There is no publicly-held company with a 10% or greater ownership interest in Eisai Co., Ltd. Eisai Co., Ltd. is the indirect parent of Eisai Inc. and Eisai U.S.A., Inc.

Eisai U.S.A., Inc. is an indirect subsidiary of Eisai Co., Ltd. There is no publicly-held company with a 10% or greater ownership interest in Eisai U.S.A., Inc.

Eisai Inc. is an indirect subsidiary of Eisai Co., Ltd. There is no publicly-held company with a 10% or greater ownership interest in Eisai Inc.

Akzo Nobel Chemicals B.V. and Akzo Nobel Inc. are indirect, wholly-owned subsidiaries of Akzo Nobel N.V. Apart from Akzo Nobel N.V., there is no publicly-held company with a 10% or greater ownership interest in Akzo Nobel Chemicals B.V. or Akzo Nobel Inc.

Mitsui & Co., Ltd., a publicly-held company, owns a 20% interest in Bioproducts Incorporated. There is no person or entity that owns 10% or more of this publicly-traded company. Mitsui & Co. (U.S.A.), Inc., a wholly-owned subsidiary of Mitsui & Co., Ltd., owns an 80% interest in Bioproducts Incorporated.

Chinook Group Ltd. is a wholly-owned subsidiary of Cope Investments Ltd. There is no publicly-held company with a 10% or greater ownership interest in Chinook Group Ltd.

There is no publicly-held company with a 10% or greater ownership interest in Cope Investments Ltd.

Two German companies, E.On AG and RAG, collectively own 93% of Degussa AG's (f/k/a Degussa-Hüls AG) stock. No other entity owns more than 10% of Degussa AG's stock.

Degussa Corp. (f/k/a Degussa-Hüls Corporation) is a subsidiary of Degussa AG. Apart from Degussa AG, and indirectly, E.On AG and RAG, there is no publicly-held company with a 10% or greater ownership interest in Degussa Corp.

There is no publicly-held company with a 10% or greater ownership interest in DuCoa, L.P.

DCV, Inc. is the general partner of DuCoa, L.P. DCV Holdings, Inc. is the parent company of DCV, Inc. Metropolitan Life Insurance has over a 10% interest in DCV, Inc.'s parent company.

E. Merck is a general partnership organized under German law and is engaged in the pharmaceutical, chemicals and other lines of business.

There is no publicly-held company with a 10% or greater ownership interest in E. Merck or Merck KGaA.

E. Merck and Merck KGaA together directly or indirectly own 100% of the shares of EM Industries, Inc., now known as EMD Chemicals Inc.

Alusuisse-Lonza Group Ltd, a former affiliate of Lonza Inc. and Lonza AG, is a corporation with interests in various businesses including alumina and bauxite. It is now known as Alcan (Switzerland) Ltd. It is a 100%-owned subsidiary of Alcan Inc., a public company.

Lonza AG is a direct, wholly-owned subsidiary of Lonza Group Ltd. Apart from Lonza Group Ltd, there is no publicly-held company with a 10% or greater ownership interest in Lonza AG.

Lonza Inc. is an indirect, wholly-owned subsidiary of Lonza Group Ltd. Apart from Lonza Group Ltd, there is no publicly-held company with a 10% or greater ownership interest in Lonza Inc.

Nepera, Inc. is a wholly-owned subsidiary of Cambrex Corporation, a publicly-held company.

Reilly Industries, Inc. has no parent corporations and there is no publicly-held company with a 10% or greater ownership interest in Reilly Industries, Inc.

Reilly Chemicals, S.A. is a subsidiary of Reilly Industries, Inc. There is no publicly-held company with a 10% or greater ownership interest in Reilly Chemicals, S.A.

There is no publicly-held company with a 10% or greater interest in Sumitomo Chemical Co., Ltd.

Sumitomo Chemical America, Inc. is a wholly-owned subsidiary of Sumitomo Chemical Co., Ltd.

Tanabe U.S.A. Inc. is an indirectly owned subsidiary of Tanabe Seiyaku Co., Ltd. Apart from Tanabe Seiyaku Co., Ltd., there is no publicly-held company with a 10% or greater ownership interest in Tanabe U.S.A. Inc.

Service Specialties, Inc., f/k/a UCB Chemicals Corp., is wholly-owned by UCB, Inc., which in turn is wholly-owned by UCB S.A. UCB S.A. is aware of one publicly traded company, Financiere d'Obourg S.A., that owns more than 10% of UCB S.A.'s stock.

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IN THE

Supreme Court of the United States

No. ___

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., *et al.*,

Petitioners,

v.

EMPAGRAN, S.A., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 315 F.3d 338. App., *infra*, 1a-42a. The orders of the court of appeals denying petitioners' petition for rehearing and petition for rehearing en banc are unreported. App., *infra*, 43a, 44a. The opinion of the district court is unreported. App., *infra*, 45a-62a.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2003. Petitioners' timely petitions for rehearing and for rehearing en banc were denied on September 11, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

The Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, Title IV, 96 Stat. 1233, 1246 (1982), codified at 15 U.S.C. § 6a, provides:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

STATEMENT

This petition presents a frequently recurring question of exceptional importance that has divided the federal courts of appeals: whether plaintiffs may sue under U.S. antitrust law to remedy injuries arising from the effects of anticompetitive conduct on purely foreign commerce. A divided panel of the court below answered yes, holding that the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a, provides foreign plaintiffs with a U.S. antitrust remedy for injuries sustained entirely outside U.S. commerce. According to that ruling, foreign plaintiffs may assert U.S. antitrust claims so long as the conduct that caused their injury also affected U.S. commerce and the effects on U.S. commerce "give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." App., *infra*, 4a.

The Second and Fifth Circuits previously have reached conflicting conclusions as to whether the FTAIA authorizes or prohibits Sherman Act claims arising solely from injuries sustained in foreign commerce. The D.C. Circuit's decision in this case expressly conflicts with the Fifth Circuit's decision and rejects the reasoning of the Second Circuit. It is also inconsistent with a recent Third Circuit ruling that foreign plaintiffs injured in purely foreign transactions lack standing to assert Sherman Act claims.

Review by this Court is warranted. The federal courts are divided over an important and frequently recurring question of the extraterritorial reach of the U.S. antitrust laws. Congress did not intend to have the federal antitrust laws regulate transactions between foreign buyers and foreign sellers in foreign countries. As the Solicitor General argued below as *amicus curiae* in support of en banc review, the D.C. Circuit's decision fundamentally misconstrues the FTAIA, threatens to undermine the U.S. government's antitrust enforcement efforts and will needlessly flood U.S. courts with foreign claims.

1. Statutory Background. Section 1 of the Sherman Act prohibits restraints of trade or commerce within the United States or "with foreign nations." 15 U.S.C. § 1. Section 4 of the Clayton Act provides a private remedy to persons injured "by reason of anything forbidden in the antitrust laws." § 15. Together, they establish a scheme of civil liability for injuries resulting from restraints on U.S. commerce. Neither statute expresses any concern with the effects of anticompetitive conduct on purely foreign commerce.

The FTAIA was enacted in 1982 to address concerns that unduly expansive projection of federal antitrust law would hinder U.S. global competitiveness. The FTAIA did not expand the jurisdictional reach of U.S. law to impose liability for injuries sustained in transactions entirely outside U.S. commerce. To the contrary, the FTAIA *limits* the extra-territorial scope of the Sherman Act. It states that the antitrust laws "shall not apply" to conduct involving commerce with foreign nations (excepting U.S. import commerce) unless such conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce *and* that domestic effect "gives rise to a claim" under the Sherman Act. 15 U.S.C. § 6a. Through the latter condition, Congress required that "the 'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws." H.R. Rep. No. 97-686, at 10-12 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487.

Until a 2002 decision by the Second Circuit, no court had ever held that the federal antitrust laws authorize claims seeking to remedy harms resulting solely from the effects of anticompetitive conduct on *non-U.S.* commerce. The D.C. Circuit has now also adopted that conclusion, holding that the FTAIA in effect *expanded* the extraterritorial reach of the Sherman Act. The Second Circuit and D.C. Circuit decisions both directly conflict with a 2001 ruling by the Fifth Circuit that claims seeking recovery for injuries resulting from the

foreign effects of anticompetitive conduct fall outside the jurisdictional scope of the Sherman Act. The decision below is also inconsistent with the Third Circuit's view that a plaintiff injured in purely foreign commercial transactions lacks standing to seek redress under U.S. antitrust law.

2. Factual Background. Respondents are five foreign companies located in Australia, Ecuador, Panama and Ukraine. They initiated this action in July 2000, alleging that a worldwide cartel of bulk vitamin distributors conspired to fix prices and allocate markets on a global basis in violation of the Sherman Act, and invoking the district court's jurisdiction under 15 U.S.C. § 15(a) and 28 U.S.C. §§ 1331, 1337. Respondents purport to represent a class of all foreign purchasers of vitamins from petitioners. They seek treble damages and injunctive relief based solely on vitamin purchases outside the United States. Respondents do not contend that they were injured in U.S. commerce.

The alleged vitamin cartel has prompted numerous criminal and civil proceedings both in the United States and abroad. In the United States, some petitioners have pled guilty to criminal antitrust violations and collectively paid $900 million in fines. See App., *infra*, 68a. In addition, more than 75 federal antitrust cases, including class actions, were consolidated for pretrial proceedings in the district court. The vast majority of the claims in those cases have now been settled, for amounts exceeding $2 billion. Lawsuits seeking damages for alleged violations of state law have also been filed. Outside the United States, record civil penalties exceeding €855 million have been assessed against some petitioners by the European Union, Canada, Australia and Korea. App., *infra*, 68a. Private civil suits for damages have also been filed in Canada, the United Kingdom, Germany, Belgium and the Netherlands, and class actions have been filed in Canada, Australia and New Zealand.

3. The District Court Decision. The district court dismissed plaintiffs' Sherman Act claims for lack of subject matter jurisdiction, explaining that the federal antitrust laws provide no remedy to "persons injured abroad in transactions otherwise unconnected with the United States." App., *infra*, 48a, 52a. The court relied on the plain meaning of the FTAIA to rule that the Sherman Act does not apply to claims arising from vitamin purchases outside the United States with no impact on U.S. commerce. *Id.* at 48a-52a. The district court noted that its construction of the FTAIA was supported by existing case law, including the Fifth Circuit's opinion in *Den Norske Stats Oljeselskap AS v. HeereMac v.o.f.*, 241 F.3d 420 (5th Cir. 2001), *cert. denied sub nom. Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002). App., *infra*, 50a-51a. The Second Circuit had not yet issued its opinion adopting a contrary view of the FTAIA. *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002), *petition for cert. dismissed*, 71 U.S.L.W. 3169 (Aug. 8, 2003) (No. 02-340).

4. The Court of Appeals Decision. The court of appeals reversed the district court and held that the U.S. antitrust laws provide a remedy for injuries sustained in purely foreign commerce, expressly rejecting the Fifth Circuit's contrary ruling in *HeereMac*. The D.C. Circuit ruled that so long as "*someone*, even if not the foreign plaintiff who is before the court," has an injury arising from an effect of the defendant's conduct on U.S. commerce, every foreign plaintiff with a claim arising from a purely foreign effect can sue as well. App., *infra*, 4a, 19a-20a (emphasis added). The court of appeals agreed with the result, but not the reasoning, of the Second Circuit in *Kruman*. See *id.* at 19a-20a.

The D.C. Circuit did not rest its conclusion on the text of the FTAIA, which it believed has "no 'plain meaning'." App., *infra*, 4a. Instead, the court of appeals relied on selected statements in the House Report on the FTAIA that it regarded as "consistent" with its holding and more significant than

other statements in the House Report supporting the Fifth Circuit's construction of the statute. App., *infra*, 24a-30a. The most important consideration for the court, however, was its determination that, as a matter of policy, "suits by foreign purchasers harmed solely by a conspiracy's foreign effects are necessary to protect U.S. commerce from global conspiracies." App., *infra*, 32a. The court claimed support for this conclusion in "underlying policies of deterrence" that it found "emanating" from this Court's decision in *Pfizer Inc. v. Government of India*, 434 U.S. 308 (1978). App., *infra*, 4a, 32a-33a. This consideration also led the court to hold that respondents have standing to pursue their claims. See *id.* at 33a-37a.

Judge Henderson dissented on the ground that "the plain language in subsection (2) of the FTAIA expressly limits jurisdiction to a claim which itself arises from the domestic antitrust effect required under subsection (1) of the statute." App., *infra*, 42a. She added that the Fifth Circuit's construction reflects the "more natural" reading of § 6a(2) and is "unambiguously supported" by the legislative history. *Id.* at 40a.

5. The Position of the United States. On petition for rehearing en banc, the court of appeals invited the Solicitor General to submit a brief expressing the views of the United States. In response, the Solicitor General urged en banc review to reverse the decision below.[1] He explained that this case raises "an issue of exceptional and recurring importance regarding the scope of the antitrust laws." App., *infra*, 73a. The Solicitor General disagreed with the panel's ruling, in part because the "most natural reading" of the FTAIA "is that

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[1] *Brief of the United States and the Federal Trade Commission as Amici Curiae in Support of Petition for Rehearing En Banc, Empagran S.A., et al., v. F. Hoffmann-La Roche, Ltd., et al.*, 315 F.3d 338 (D.C. Cir. 2003) (No. 01-7115). The brief submitted by the Solicitor General is reproduced in the appendix to this petition. App., *infra*, 63a-82a.

the requisite anticompetitive effects on domestic commerce must give rise to the claim brought by the *particular plaintiff* before the court." *Id.* at 74a (emphasis in original). The Solicitor General also expressly rejected the opinion's deterrence rationale. "[C]onsiderations based on deterrence," the Solicitor General explained, "counsel *against* the panel's expansive interpretation of the FTAIA," because increasing the potential liability of antitrust offenders worldwide will discourage them from voluntarily disclosing misconduct to the Department of Justice under its corporate leniency program. *Id.* at 78a (emphasis in original).

Notwithstanding the position of the United States, the D.C. Circuit denied rehearing en banc by a 4 to 3 vote, with Judges Sentelle, Henderson and Randolph voting to grant rehearing and Judges Garland and Roberts not participating.

REASONS FOR GRANTING THE PETITION

This Court should grant review to resolve the conflict among the courts of appeals over the meaning of an important federal statute and to make clear that Congress did not intend to authorize antitrust claims seeking recovery for injuries resulting from the effects of anticompetitive conduct on purely foreign commerce. Resolution of this fundamental and frequently recurring issue is critical to the administration of justice and to the U.S. government's antitrust enforcement efforts and relations with foreign nations.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND WITH THE VIEWS OF THE UNITED STATES.

The courts of appeals are sharply divided over the question presented in this petition. Both the D.C. Circuit in this case and the Second Circuit in *Kruman* expressly rejected the Fifth Circuit's holding in *HeereMac*. App., *infra*, 19a-20a;

Kruman, 284 F.3d at 396-98. The D.C. Circuit recognized the conflict over the meaning of the FTAIA, stating that "the Second and Fifth Circuits have split on this very question of statutory interpretation." App., *infra*, 14a. The Seventh Circuit has similarly noted the "conflict in the circuits" on this issue, *Metallgesellschaft AG v. Sumitomo Corp.*, 325 F.3d 836, 839 (7th Cir. 2003), as has the Third Circuit, see *Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293, 306-07 (3d Cir. 2002) ("[T]he meaning of [the FTAIA] has split two of our sister circuits.").

In *HeereMac*, the first court of appeals decision to interpret the FTAIA, the plaintiff, a Norwegian oil company, had alleged that an international price-fixing conspiracy by barge companies violated the Sherman Act by inflating both the plaintiff's operating costs in the North Sea and prices for barge services in the Gulf of Mexico, a U.S. market. 241 F.3d at 421. Because the plaintiff's claim arose exclusively from its North Sea contracting and not from any impact of the conspiracy on U.S. commerce, the court held that the plaintiff's claim fell outside the subject matter jurisdiction of the federal antitrust laws. *Id.* at 426. The court explained that "the plain language of the FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a non-domestic market." *Id.* at 428. The Fifth Circuit found that plain meaning confirmed by the legislative history and applicable case law, as well as by the practical implications of the plaintiff's contrary reading, which "would open United States courts to global claims on a scale never intended by Congress." *Id.* at 431. Judge Higginbotham dissented, asserting that the source of the plaintiff's injury "is irrelevant" so long as the defendant's conduct harms U.S. commerce. *Id.* at 439.

In considering the petition for certiorari in *HeereMac*, this Court invited the views of the Solicitor General. The Solicitor

General's brief, submitted on behalf of the United States and the Federal Trade Commission, stated that the Fifth Circuit's decision was "consistent with the statutory text, history, and purposes" of the Sherman Act and agreed with its ruling "that the FTAIA requires that the anticompetitive effects on United States commerce must give rise to a plaintiff's claimed injuries."[2] The brief further observed that, at the time, no other federal court had adopted a contrary position.

Shortly after this Court denied review in *HeereMac*, the Second Circuit in *Kruman* adopted a view of the FTAIA directly contrary to the Fifth Circuit's interpretation. 248 F.3d at 390. The plaintiffs in *Kruman* were purchasers and sellers at foreign auctions who alleged an international conspiracy by the world's two largest auction houses to fix prices and commissions. The court concluded that, because the FTAIA amends the Sherman Act and not the Clayton Act, it does not bear on "what injury a plaintiff must suffer in order to bring suit," and thus could not be read to require that a plaintiff's injury arise from an effect on U.S. commerce. *Id.* at 397-98. In addition, according to the court, the use of the term "a claim" rather than "the plaintiff's claim" in subsection 2 of the FTAIA indicates that the Sherman Act reaches foreign conduct whenever a claim arising from a U.S. effect *could* be asserted, whether or not the plaintiff's claim *actually* arose from that U.S. effect. *Id.* at 400. A petition for certiorari filed in the *Kruman* case was dismissed after settlement by the parties.

The decision below adds to this conflict in the courts of appeals. The D.C. Circuit's determination that the FTAIA permits antitrust claims seeking to recover for harms

[2] *Brief of the United States and the Federal Trade Commission as Amici Curiae* at 5, 10-16, *Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002) (No. 00-1842). The brief submitted by the Solicitor General in *HeereMac* is available at http://www.usdoj.gov/atr/cases/f9800/9844.pdf.

sustained in purely foreign commerce directly conflicts with the Fifth Circuit's construction of the statute. The D.C. Circuit found "no 'plain meaning'" in § 6a(2) of the FTAIA, expressly rejecting the Fifth Circuit's conclusion that "'a claim' plainly refers to the plaintiff's claim." App., *infra*, 4a, 19a. The D.C. Circuit generally agreed with the Second Circuit's holding in *Kruman*, but concluded that its reasoning that the FTAIA's conditions are met whenever suit could be brought by the U.S. government, whether or not any private litigant could sue, "reach[ed] too far." App. *infra*, 4a. This disagreement in the courts of appeals over the proper interpretation of the FTAIA calls for review by this Court.

In addition, the D.C. Circuit's ruling that respondents have standing is inconsistent with the Third Circuit's decision in *Turicentro* that plaintiffs whose injuries occurred exclusively in foreign markets lack standing. 303 F.3d at 307. In *Turicentro*, the Third Circuit affirmed dismissal of antitrust claims by foreign travel agents who alleged that airlines had conspired to fix their commissions. The plaintiffs had not alleged any harm to U.S. commerce from the alleged conspiracy and thus failed to satisfy even the first condition of the FTAIA. *Id.* at 304-06. In addition, the court ruled, the plaintiffs lacked standing, based on the principle set forth in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977), that the plaintiff's injury must "flow from that which makes the defendant's acts unlawful." *Id.* at 307. Because the plaintiffs' injuries occurred exclusively in foreign markets, the Third Circuit held that they were "not of the type Congress intended to prevent through the [FTAIA] or the Sherman Act." *Id.* at 307.

There now are four conflicting opinions from the courts of appeals as to whether the U.S. antitrust laws reach the effects of anticompetitive conduct on foreign commerce. These opinions, together with two dissenting opinions, comprehensively set forth the competing considerations of law and

policy. The United States government and the Federal Trade Commission have provided their views on this recurring question of importance.[3] This circuit conflict is now ripe for the Court's resolution, and this case provides an ideal vehicle for resolving the conflict.

II. THE COURT OF APPEALS MISCONSTRUED THE FTAIA.

The FTAIA does not permit claims seeking to recover for injuries resulting from the effects of anticompetitive conduct on foreign commerce. The court of appeals' contrary ruling is refuted by the FTAIA's text, especially when read in light of essential canons of construction and the statute's purpose. The court below disregarded these key determinants of statutory meaning, relying instead on a misreading of the legislative history and its own policy judgment that its ruling was "necessary to protect U.S. commerce from global conspiracies." App., *infra*, 32a. That judgment is unsupported by any law or precedent of this Court and has been criticized by the federal agencies responsible for antitrust enforcement. Finally, the court's construction of the FTAIA is inconsistent with longstanding principles of U.S. antitrust law.

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[3] The recurring nature of the question is evidenced by the large and growing number of cases in which the district courts have addressed the issue. In addition to *HeereMac*, *Kruman* and this case, see, *e.g.*, *Sniado v. Bank Aus., AG*, 174 F. Supp. 2d 159, 170 (S.D.N.Y. 2001) (dismissing for lack of subject matter jurisdiction); *Ferromin Int'l Trade Corp. v. UCAR Int'l, Inc.*, 153 F. Supp. 2d 700, 704-05 (E.D. Pa. 2001) (same), *appeal docketed sub nom. BHP N.Z., Ltd. v. UCAR Int'l, Inc.*, Nos. 01-3329, 01-3340, 01-3991 (3d Cir. Aug. 29, 2001); *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F. Supp. 1102, 1107 (S.D.N.Y. 1984) (same); see also *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 716 (D. Md. 2001) (dismissing for lack of standing); *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, No. C97-3259 FMS, 1997 WL 732498, at *4 (N.D. Cal. Nov. 19, 1997) (same); *de Atucha v. Commodity Exch., Inc.*, 608 F. Supp. 510, 518 (S.D.N.Y. 1985) (same).

A. The FTAIA Does Not Authorize Claims Seeking to Remedy Injuries Sustained in Purely Foreign Commerce.

The restrictive nature of the FTAIA is made clear by its text, by canons of statutory construction that discourage the extraterritorial projection of U.S. law without a clear textual mandate and by the statute's evident purpose.

1. Statutory Text. As the Solicitor General has argued, "the most natural reading" of the FTAIA is that it does not allow claims to remedy harms arising from the foreign effects of anticompetitive conduct. App., *infra*, 74a. The preamble's negative mandate—that the Sherman Act "shall not apply"—precludes U.S. antitrust scrutiny of conduct involving foreign commerce "unless" two conditions are satisfied, each of which is tied to an effect on U.S. commerce. 15 U.S.C. § 6a. First, the conduct must have a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. § 6a(1). Second, "such effect" must "give[] rise to a claim" under the Sherman Act. § 6a(2). These conditions are followed by a concluding proviso that confirms the FTAIA's restrictive purpose: although the Sherman Act may apply to export trade with foreign nations, it does so only in the case of "a person engaged" in such trade "*in the United States*" and "*only* for injury to export business *in the United States*." § 6a (emphasis added.).

This cumulative language of limitation repeatedly returns to domestic effects as the sole concern of U.S. antitrust law. It cannot plausibly be read to *expand* the jurisdictional reach of that law to the foreign effects of anticompetitive conduct. As the Solicitor General explained in urging en banc rehearing below, "[the FTAIA's] text contains no hint of a statutory purpose to permit recovery where the situs of injury is entirely foreign and the injury exclusively arises from a conspiracy's effect on foreign commerce." App., *infra*, 75a.

The court of appeals theorized that the phrase "a claim" instead of "the plaintiff's claim" in subsection 2 created an "ambiguity" as to the FTAIA's meaning. App., *infra*, 19a-20a. But as the Solicitor General has stated, "the most natural reading of Section 6a(2)'s requirement that 'such effect gives rise to a claim' is that the requisite anticompetitive effects on domestic commerce must give rise to the claim brought by the *particular plaintiff* before the court." App., *infra*, 74a (emphasis in original). This Court has refused to use "[t]he article 'a'" to determine a provision's meaning, *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 500 (1998), or to "ascrib[e] to one word a meaning so broad that it...[gives] unintended breadth" to a statute, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). See also *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (surrounding language indicated that Congress intended "a precise and narrow application" of statutory provision). If Congress had intended the FTAIA to authorize *everyone* to bring an antitrust suit so long as *someone* could, it surely would have said so by a definite statement, not by using an indefinite article in an otherwise restrictive provision.

The significance ascribed to the "a claim" language is also refuted by its origins. The bill initially reported by the Judiciary Committee required that an effect on domestic commerce must be "the basis of the violation alleged under this Act." H.R. Rep. No. 97-686, at 1 (text of bill as reported). Chairman Rodino explained that this language was changed to state that the effect must "give[] rise to a claim" only as a "minor clarification," because technically an "effect" does not give rise to a "violation" but rather to "a claim." *Id.* at 18. This explanation confirms that the presence of the indefinite article "a" before "claim" was not intended to usher in a new wave of global antitrust litigation in U.S. courts. *Id.* at 2 (describing FTAIA "as a simple and straightforward clarification of existing American law").

The structure of the FTAIA further demonstrates that the claim before the court must arise from the effects produced by the conduct at issue on U.S. commerce. By first excluding from the reach of the Sherman Act all conduct without such effects and then requiring that those effects "give[] rise to a claim," Congress made clear that a claim under the Sherman Act *must* seek to remedy a U.S. effect. The court below disregarded this deliberate juxtaposition. See *Holloway v. United States*, 526 U.S. 1, 6 (1999) (courts must consider "placement" of statutory phrase).

2. Canons of Construction. Established canons of construction reinforce the restrictive meaning of the FTAIA. A statute may not be construed to prescribe U.S. law extraterritorially absent a "clearly expressed" intent by Congress. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). As the court of appeals recognized (App., *infra*, 20a), the FTAIA contains no language, much less "clear" language, expressing an intent by Congress to enlarge the extraterritorial application of the Sherman Act to prescribe a remedy for harms sustained in purely foreign transactions.

Federal laws must also be construed to avoid substantial constitutional difficulties whenever possible. See, *e.g.*, *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 173-74 (2001). Given that the Commerce Clause permits Congress to regulate trade "with foreign nations," it is far from clear that it would permit the construction of the FTAIA by the court below. See *HeereMac*, 241 F.3d at 426 n.18 (questioning Congress's power "to regulate purely foreign commerce"). This constitutional concern weighs against any construction of the FTAIA that would result in U.S. regulation of purely foreign commercial transactions.

3. Statutory Context and Purpose. Finally, the historical context supports the view of the FTAIA adopted by the Fifth Circuit. As this Court has stated, "American antitrust laws do not regulate the competitive conditions of other nations'

economies." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). Historically, the antitrust laws have been interpreted to reach activities outside the United States in order to address the effects of those activities on U.S. commerce, see *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945), not their effects on foreign commerce. Indeed, as the Solicitor General has observed, when Congress enacted the FTAIA in 1982, it had never been suggested that an antitrust claim may arise from an injury incurred in purely foreign commerce. See App., *infra*, 80a ("We are unaware of any decision pre-dating the FTAIA that permitted such suits.").

Nothing in the FTAIA suggests a purpose to enlarge the extraterritorial scope of the federal antitrust laws beyond their 1982 bounds. To the contrary, the FTAIA reaffirms that the exclusive focus of the antitrust laws is a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. As the Solicitor General noted below, the FTAIA was prompted "by a perceived need to clarify the *limitations* of the Sherman Act's reach over international transactions." App., *infra*, 76a (emphasis added). Construed in light of its historical context, the FTAIA cannot plausibly be read to expand that reach. *Hartford Fire*, 509 U.S. at 796 n.23 ("The FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the *United States economy*.") (emphasis added); see also *Pierce County v. Guillen*, 537 U.S. 129, 146 (2003) (plain meaning of amendment "was reinforced by [its] history").

Leading commentators have recognized that the FTAIA made clear that "the concern of the antitrust laws is protection of *American* consumers and *American* exporters, not foreign consumers or producers." IA Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 272h, at 358-59 (2d ed. 2000) (emphasis in original). John Shenefield, head of the

Antitrust Division from 1977-1979, confirmed the statute's restrictive purpose, noting that Congress enacted the FTAIA to resolve uncertainties "in favor of denying jurisdiction" over "conduct affecting wholly foreign commerce" and to clarify that, "[i]n such cases, private litigants have no right to recover damages." John H. Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORDHAM L. REV. 350, 364 (1983).

B. The Grounds Advanced by the Court Below Cannot Support Its Construction of the FTAIA.

The court of appeals found "no 'plain meaning'" in the text of the FTAIA. App., *infra*, 4a. It instead relied on legislative history and a policy judgment that its reading of the statute was "necessary to protect U.S. commerce from global conspiracies." *Id.* at 32a. Neither of these grounds can justify the court of appeals' decision. They are inadequate to supply the clear expression of congressional intent necessary to expand the extraterritorial application of U.S. law.

1. Legislative History Rationale. The legislative history does not support the court of appeals' interpretation of the FTAIA. The House Report explains that subsection 2 of the statute was added in order "to require that the 'effect' providing the jurisdictional nexus"—*i.e.*, the "direct, substantial, and reasonably foreseeable" effect on U.S. commerce required by subsection 1—"must also be the basis for the injury alleged." H.R. Rep. No. 97-686, at 11-12. In addition, the House Report repeatedly refers to the protections afforded to foreign purchasers under the antitrust laws "*in the domestic marketplace*." *Id.* at 10 (emphasis added). By emphasizing the need for a "nexus" to "the "domestic marketplace," Congress plainly sought to restrict Sherman Act litigation to claims involving injury incurred in U.S. commerce. As the Seventh Circuit has recognized, "the

legislative history shows that jurisdiction stripping is what Congress had in mind in enacting the FTAIA." *United Phosphorus, Ltd. v. ANGUS Chem. Co.*, 322 F.3d 942, 951 (7th Cir. 2003), *petition for cert. denied*, 72 U.S.L.W. 18 (Nov. 10, 2003) (No. 03-203).

In claiming support from the legislative history, the D.C. Circuit focused on a statement in the House Report that "the impact of the illegal conduct" need not "be experienced by the injured party *within* the United States." App., *infra*, 24a-25a (emphasis added). But this statement does not authorize an antitrust claim where the party's injury does not arise from an effect on *U.S. commerce*. It merely reiterates established law that injuries sustained abroad may be recoverable under U.S. antitrust law if the plaintiff was harmed while doing business in U.S. commerce. See, *e.g.*, *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 816-17 (D.C. Cir. 1968) (holding that injuries of American companies excluded from federally-financed ocean shipping between foreign countries were actionable because they were injuries sustained in U.S. commerce). The court also wrongly inferred that, because parts of the House Report discussed only the sorts of U.S. effects that would be "sufficient," Congress must not have intended also to require that the plaintiff's claim arise from a U.S. effect. App., *infra*, 28a. Nothing in the fragments of the House Report cited by the D.C. Circuit justifies its holding that "foreign plaintiffs injured solely by the foreign effects of the anticompetitive conduct may sue, so long as the conduct also harms U.S. commerce." App., *infra*, 24a. To the contrary, the legislative history demonstrates that Congress sought to restrict, not expand, the application of U.S. law to foreign controversies.

2. Deterrence Rationale. Nor does the deterrence rationale invoked by the court of appeals justify its construction of the FTAIA. The court erred by elevating its own policy judgments about optimal antitrust deterrence over Congress's

intentions as expressed in the language of the FTAIA. The court was also wrong in its assumption that antitrust deterrence would be enhanced by authorizing persons injured outside U.S. commerce to recover damages under U.S. law.

To support its expansive reading of the FTAIA, the court cited "policies of deterrence" that it viewed as "emanating" from this Court's decision in *Pfizer*. App., *infra*, 4a, 30a-33a. But *Pfizer* simply held that a foreign state is a "person" entitled to sue under the Clayton Act. 434 U.S. at 320. *Pfizer* noted that its reading would advance deterrence, but it never suggested that U.S. antitrust law provides a remedy for injuries sustained outside U.S. commerce. To the contrary, the Court expressly stated that U.S. antitrust law should protect a foreign government that "enters *our commercial markets*." *Id.* at 318 (emphasis added).[4]

Congress has specifically prescribed what it views as sufficient deterrence, and that prescription does not include permitting claims by persons injured outside U.S. commerce. Over the years, Congress has steadily increased the criminal penalties that may be imposed on corporations for violations of the Sherman Act from $50,000 (prior to 1974) to $10,000,000 today. And actual penalties substantially exceed these amounts as a result of other provisions of the criminal code which authorize fines based on twice the corporation's pecuniary gain from price fixing or twice the victim's loss. See 18 U.S.C. § 3571. Indeed, one petitioner in this case has paid a $500 million criminal penalty to the U.S. government, the largest criminal fine ever obtained by the Department of Justice. App., *infra*, 68a. The court of appeals made no mention of the deterrent effect of these criminal sanctions (or

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[4] Only this Court can provide the necessary clarification of its ruling in *Pfizer*, which has been read to have different meanings by the majority and dissenting opinions from the Second, Fifth and D.C. Circuits. See App., *infra*, 30a-32a; *Kruman*, 284 F.3d at 403; *HeereMac*, 241 F.3d at 430; *id.* at 434-35 (Higginbotham, J. dissenting).

the fines and prison terms imposed on individuals personally) in reaching its decision that additional civil liability was "necessary" for adequate deterrence. Nor did it consider the deterrent effect of civil damages claims under state laws that permit suits by indirect purchasers barred from asserting federal claims. It also ignored the substantial deterrent effect of civil claims under foreign laws and of foreign governmental enforcement proceedings, which in the case of the alleged vitamin cartel resulted in aggregate fines exceeding €855 million. See App., *infra*, 68a.

Finally, as a matter of antitrust enforcement policy, the court of appeals' judgment is simply wrong. The federal agencies charged with enforcing the antitrust laws have already warned that the decision below will weaken, rather than enhance, deterrence. As the Solicitor General explained below, imposing treble damages liability for worldwide sales will discourage antitrust violators from disclosing criminal conduct under programs in the United States and other jurisdictions that provide amnesty from criminal prosecution. *Id.* at 78a-79a. Amnesty programs, "the number one source of leads for breaking up international cartels," promote deterrence by increasing the probability that illegal practices will eventually be detected. *Id.* at 78a. The court of appeals should not have allowed its own view of effective deterrence to override the assessment of the U.S. antitrust enforcement agencies.

C. The Court of Appeals Ignored Antitrust Standing and Injury Requirements Recognized in This Court's Decisions.

A final, and conclusive, reason to reject the D.C. Circuit's expansive view of the U.S. antitrust laws is that, as the Solicitor General explained below, it conflicts with longstanding principles of standing and antitrust injury that "Congress incorporated [into] the FTAIA." App., *infra*, 75a.

Those "longstanding principles" require an antitrust plaintiff to show that it—and not some other person—suffered "an injury of the type the antitrust laws were designed to prevent." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 111-13 (1986). A plaintiff's injury, to be actionable, must "flow[] from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489. Subsection 1 of the FTAIA, under any of the statute's competing interpretations, makes clear that "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce is necessary for foreign conduct to be unlawful. Accordingly, as a matter of antitrust standing, only injuries that "flow from" those U.S. effects are actionable. As the Third Circuit has recognized, injuries occurring "exclusively in foreign markets * * * are not of the type Congress intended to prevent through the [FTAIA] or the Sherman Act." *Turicentro*, 303 F.3d at 307. By expressly requiring that a claim must "arise from" a U.S. effect, the jurisdictional limitation of subsection 2 of the FTAIA is consistent with the standing requirement expressed by this Court in *Brunswick*. It requires that the plaintiff's injury "flow from" the U.S. effect that makes the defendant's conduct unlawful.

To reject that conclusion, as the court below did, is to read the FTAIA as an affirmative grant of standing to persons injured in foreign commerce *even though* their injuries *do not* flow from any U.S. effect. It turns the FTAIA into a silent partial repeal of the basic standing principles laid down by this Court in *Brunswick*, for the benefit of foreign plaintiffs. Subsection 2 should not be interpreted as having effected so dramatic a change, because its most natural reading comports with existing law and because Congress specifically disclaimed any intent to make such a change. See H.R. Rep. No. 97-686, at 11 ("[T]he Committee does not intend to alter existing concepts of antitrust injury or antitrust standing.").

III. THE FREQUENTLY RECURRING QUESTION PRESENTED IN THIS CASE HAS EXCEPTIONAL PUBLIC IMPORTANCE.

As the Solicitor General stated in urging en banc rehearing by the court below, this case raises "an issue of exceptional and recurring importance regarding the scope of the antitrust laws." App., *infra*, 73a. R. Hewitt Pate, Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice, has identified the question of "foreign jurisdiction" presented in this case as one that needs "clarification" by this Court. *Roundtable Conference with Enforcement Officials*, 71 ANTITRUST L.J. 333, 374-75 (2003).

In today's global economy, it will not be difficult to allege that a wide variety of foreign "conduct" has some "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. Indeed, as the Solicitor General has noted, foreign plaintiffs are bringing such claims with "increasing frequency." App., *infra*, 73a. If an antitrust claim need not arise from a U.S. effect, as the court below held, new cases from all over the world will flood the federal district courts. Foreign plaintiffs, attracted by the powerful lure of treble damages, attorneys' fees, liberal discovery, joint and several liability, class actions and jury trials, will "flock to United States federal courts" rather than pursue claims in their home countries under their own laws. *HeereMac*, 241 F.3d at 427-28. That risk is heightened by the uncabined character of the court of appeals' ruling. It is not limited to cases alleging "per se" antitrust violations, such as price-fixing or market-allocation agreements; it also permits foreign plaintiffs to pursue damages claims subject to a "rule of reason" analysis, monopolization claims and even challenges to mergers and joint ventures. As the Solicitor General has warned, the majority's position "would effect a sea change in the number and type of private actions permitted under the Sherman Act." App., *infra*, 79a.

Importing these cases into U.S. courts infringes the right of foreign nations to regulate their own markets according to their own laws and policies. A key motivation for enactment of the FTAIA was to "encourage our trading partners to take more effective steps to protect competition in their markets." H.R. Rep. No. 97-686, at 14. Congress's work has borne fruit. "[N]early 100 jurisdictions now have comprehensive antitrust laws," and "[n]early all" of these "now ban cartels either civilly or criminally." R. Hewitt Pate, *The DOJ International Antitrust Program—Maintaining the Momentum*, Speech Before the ABA Section of Antitrust Law, at 6, 8 (Feb. 6, 2003).[5] This "wave of antitrust legislation in European and other countries" (1 Fugate, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 2.1, at 45 (5th ed. 1996)) counsels caution in extending the reach of United States antitrust laws.

Many countries, as a matter of public policy, have rejected treble damages as "one of the most unacceptable aspects of U.S. regulatory law." Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 251 (2001). That policy choice should be respected and not voided by U.S. courts. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (rejecting "parochial concept that all disputes must be resolved under our laws and in our courts"). Permitting foreign plaintiffs to reject the means chosen by their own nations to protect competition and instead seek treble damages in U.S. courts will vastly enlarge liability for transactions otherwise governed by foreign laws and is bound to lead to "conflict and resentment" and retaliatory legislation. See ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 1208-09 (5th ed. 2002) (discussing foreign "blocking statutes" that bar enforcement of U.S. treble damages judgments); see also

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[5] Transcript available at www.usdoj.gov/atr/public/speeches/200736.pdf.

Spencer W. Waller, ANTITRUST AND AMERICAN BUSINESS ABROAD § 4:6 (3d ed. 2002) ("The perceived affront to sovereignty implicit in some forms of extraterritorial regulation has been the ground of many foreign governmental objections.").

The question presented in this case is, therefore, one of exceptional importance. Cartel conspiracy cases are massive, sprawling and expensive to litigate. The decision of the court of appeals, allowing such cases to be transported from around the globe to this country, not only compounds the burdens they impose on litigants and the U.S. judicial system but also infringes the sovereign prerogatives of foreign nations.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-7115

EMPAGRAN S.A., *et al.*,
Appellants,

v.

F. HOFFMAN-LAROCHE, LTD., *et al.*,
Appellees.

(Argued September 9, 2002 Decided January 17, 2003)

EDWARDS, *Circuit Judge*:

The action in this case was filed under section 1 of the Sherman Act, 15 U.S.C. § 1, sections 4 and 16 of the Clayton Act, 15 U.S.C. § 15 and 26, the antitrust laws of foreign nations, and international law, on behalf of all foreign purchasers of certain vitamins, vitamin premixes, and bulk vitamin products and precursors, against a number of corporations, both foreign and domestic, who distribute and sell these vitamin products around the world. Appellants contend that appellees engaged in an over-arching worldwide conspiracy to raise, stabilize, and maintain the prices of vitamins; that this cartel operated on a global basis and affected virtually every market where appellees operated worldwide; and that appellees' unlawful price-fixing conduct had adverse effects in the United States and in other nations that caused injury to appellants in connection with their foreign purchases of vitamin products. Appellees moved to dismiss the action in the District Court, asserting that the

court lacked subject matter jurisdiction under the federal antitrust laws, because the injuries plaintiffs sought to redress were allegedly sustained in transactions that lack any direct connection to United States commerce. The District Court granted the motion to dismiss and appellants now appeal.

This appeal requires us to interpret the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, to determine the jurisdictional reach of the federal antitrust laws. FTAIA, which amended the Sherman Act, provides that the Sherman Act "shall not apply to conduct" involving trade or commerce with foreign nations unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on trade or commerce in the United States, and "such effect gives rise to a claim" under the provisions of the Sherman Act. Section 6a(1) of FTAIA makes it clear that our federal antitrust laws regulate foreign conduct only where that conduct has the proscribed "effects" on domestic or foreign United States commerce. And § 6a(2) of FTAIA provides that the antitrust laws are inapplicable unless the effect of extraterritorial conduct on United States commerce "gives rise to a claim" under the Sherman Act. The District Court held that, under FTAIA, a plaintiff must establish that the injuries it seeks to remedy actually arose from the anticompetitive effects of the defendants' conduct on United States commerce. In other words, it is not enough for a plaintiff to show that other persons were injured by such United States effects; the United States effects themselves must give rise to plaintiff's claim. This *restrictive view* of FTAIA's jurisdictional reach finds support in the Fifth Circuit. *See Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420 (5th Cir. 2001).

Appellants contend that the District Court misconstrued FTAIA. According to appellants, FTAIA applies to "conduct" that has a "direct, substantial, and reasonably foreseeable effect" on United States commerce, *if*—not merely to the

extent that—the requisite United States effects are found. Thus, according to appellants, Congress did not limit jurisdiction to "the same claim" as that on which the jurisdictional effects are based. Rather, Congress provided only that "a" claim cognizable under the Sherman Act must exist. Once a jurisdictional nexus exists, FTAIA does not limit the types of plaintiffs who may seek relief. Thus, according to appellants, it does not matter that the transactions in which they purchased vitamins took place outside of United States commerce. This *less restrictive view* of FTAIA's jurisdictional reach finds support in the Second Circuit. *See Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002).

In the alternative, appellants claim that their complaint states a viable cause of action even under the District Court's *restrictive view* of FTAIA. Appellants contend that appellees caused injury to purchasers outside of the United States as a result of the anticompetitive effects of price changes and supply shifts in United States commerce. Not only was United States commerce directly affected by the worldwide conspiracy, appellants say, but the cartel raised prices around the world in order to keep prices in equilibrium with United States prices in order to avoid a system of arbitrage. Thus, according to appellants, the "fixed" United States prices acted as a benchmark for the world's vitamin prices in other markets. On this view of the alleged facts, appellants claim that the foreign plaintiffs were injured as a direct result of the increases in United States prices even though they bought vitamins abroad. The District Court did not address this alternative theory of jurisdiction. Neither the Second Circuit nor the Fifth Circuit embrace this view of FTAIA's jurisdictional reach, nor do we. In light of our disposition in favor of appellant on other grounds, we find it unnecessary to address this "alternative" theory of subject matter jurisdiction.

We can find no "plain meaning" in § 6a(2) of FTAIA. Nor do we find any easy resolution of this case by reference to the decisions of the Second and Fifth Circuits. The majority opinion in *Den Norske Stats Oljeselskap As v. Heeremac Vof* seems to us to endorse a view of FTAIA that is overly rigid, in light of the words of the statute and relevant portions of the legislative history. And, as we explain below, the opinion in *Kruman v. Christie's International PLC* seems to reach too far in its view of subject matter jurisdiction. Our view of the statute falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former.

We hold that where the anticompetitive conduct has the requisite harm on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce. The anticompetitive conduct itself must violate the Sherman Act and the conduct's harmful effect on United States commerce must give rise to "a claim" by someone, even if not the foreign plaintiff who is before the court. Although the language of § 6a(2) does not plainly resolve this case, we believe that our holding regarding the jurisdictional reach of FTAIA is faithful to the language of the statute. We reach this conclusion not only by virtue of our literal reading of the statute, but also in light of the statute's legislative history and underlying policies of deterrence emanating from the Supreme Court's decision in *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978).

Because the foreign plaintiffs here have alleged that the United States effects of appellees' cartel give rise to antitrust claims by parties injured in the United States from transactions occurring in the United States, we hold that subject matter jurisdiction is proper. We also find that appellants have standing to sue under the antitrust laws. We therefore

reverse the District Court's decision, vacate the judgment against appellants, and remand the case for further proceedings consistent with this opinion.

I. BACKGROUND

Section 1 of the Sherman Act makes unlawful "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. . . ." 15 U.S.C. § 1. Section 4 of the Clayton Act confers a cause of action on "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," and provides for treble damages. *Id.* § 15(a). Section 16 of the Clayton Act entitles "[a]ny person, firm, corporation or association . . . to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws. . . ." *Id.* § 26. In 1982, Congress enacted FTAIA, which amended the Sherman Act to make the Sherman Act inapplicable to non-import foreign commerce unless the conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce, and "such effect gives rise to a claim under" the Sherman Act. *Id.* § 6a. The text of FTAIA provides, in full:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

Id.

Appellees ("vitamin companies") are manufacturers and distributors of vitamins and vitamin products. Appellants ("foreign purchasers" or "foreign plaintiffs") are foreign corporations domiciled in various foreign countries, who purchased vitamins abroad from the vitamin companies or their alleged co-conspirators from January 1, 1988 to February 1999, for delivery outside the United States. The plaintiffs in this case originally filed a class action suit on behalf of foreign and domestic purchasers of vitamins, alleging "a massive and long-running conspiracy" among the vitamin companies and their co-conspirators "with the purpose and effect of fixing prices, allocating market share, and committing other unlawful practices designed to inflate the prices of various vitamins . . . sold to the Plaintiffs and other purchasers both within and outside the United States." Amend. Compl. at ¶ 1, Joint Appendix ("J.A.") 15-16. The plaintiffs sought injunctive relief and damages under § 1 of the Sherman Act; §§ 4 and 16 of the Clayton Act; the antitrust laws of relevant foreign nations; and international law. *Id.* at ¶ 7, J.A. 19.

The vitamin companies moved to dismiss the suit as to the foreign plaintiffs pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction under the federal antitrust laws, and for lack of standing under the federal antitrust laws. They also urged the District Court to decline to exercise supplemental jurisdiction over the foreign law claims, and to

dismiss the international law claims for failure to state a claim upon which relief may be granted. The District Court held that it lacked subject matter jurisdiction under FTAIA over the foreign plaintiffs' claims. *See Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 2001 WL 761360, at *2-4 (D.D.C. June 7, 2001). The "critical question in this case," the District Court stated, "is whether allegations of a global price fixing conspiracy that affects commerce both in the United States and in other countries gives persons injured abroad in transactions otherwise unconnected with the United States a remedy under our antitrust laws." *Id.* at *2. The District Court held that, because the conspiracy's effect on U.S. commerce did not cause the foreign purchasers' injury, the court did not have jurisdiction over the foreign purchasers' claims. *See id.* at *2-4.

Because the District Court dismissed the foreign purchaser's federal claims for lack of subject matter jurisdiction, it found that it did not need to reach the issue of standing with respect to the foreign plaintiffs. *See id.* at *5. The District Court declined to exercise supplemental jurisdiction over the foreign purchasers' foreign law claims, because "these foreign law claims raise novel and complex issues of foreign law, the court has already dismissed all federal claims brought by the foreign plaintiffs for lack of subject matter jurisdiction," and because of "comity and efficiency reasons." *Id.* at *8. Finally, the District Court dismissed the foreign purchasers' claims under customary international law for failure to state a claim, because the court could not find the existence of a customary international law proscribing the conduct alleged. *See id.* at *9. The foreign purchasers filed an interlocutory appeal.

At the time of its decision, the District Court deferred ruling on the defendants' motion to dismiss the domestic plaintiffs' federal antitrust claims, and directed the domestic plaintiffs to supplement their complaint to provide more

detailed factual allegations. *Id.* at *4, 6. At the suggestion of the District Court, for practicality, *see id.* at *7 n.5, the domestic plaintiffs in the case subsequently entered into a court-approved stipulation that transferred their claims to another action pending before the District Court, *Procter & Gamble Co. v. BASF AG*, No. 99-3046 (M.D.L. No. 1285), which involved similar claims against substantially the same defendants. The parties thereby agreed that the domestic plaintiffs had no pending claims in the instant case. On September 10, 2001, the District Court granted the defendants' motion for an order directing entry of final judgment, and on April 26, 2002, the District Court entered final judgment for the defendants in the instant case. The foreign plaintiffs' appeal is therefore no longer interlocutory.

II. ANALYSIS

A. Subject Matter Jurisdiction

This court reviews *de novo* the District Court's dismissal of a complaint for lack of subject matter jurisdiction. *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1432 (D.C. Cir. 1995). A complaint may be dismissed for lack of subject matter jurisdiction only if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Sinclair v. Kleindienst*, 711 F.2d 291, 293 (D.C. Cir. 1983) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In our review, this court assumes the truth of the allegations made and construes them favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

In this case, the foreign purchasers, who bought vitamins exclusively outside the United States, allege that the vitamin companies conspired to fix vitamin prices around the world, and that the foreign purchasers paid inflated prices for vitamins abroad as a result of the global conspiracy. FTAIA makes the Sherman Act inapplicable to conduct in foreign

commerce unless the conduct has "a direct, substantial, and reasonably foreseeable effect" on domestic commerce and "such effect gives rise to a claim under" the Sherman Act. *See* 15 U.S.C. § 6a(1).

As an initial matter, the parties appear to dispute the scope of the "conduct" that should be considered for our FTAIA analysis. Essentially, appellants argue that the relevant conduct is the "massive international cartel, exercising global market power." Appellants' Br. 19. Appellees argue that the relevant conduct is solely the market transactions between them and the foreign plaintiffs overseas. Appellees' Br. 20-21. Both the Second and Fifth Circuits have adopted appellants' approach, and appellants' approach is correct. *See Kruman*, 284 F.3d at 398; *Den Norske*, 241 F.3d at 426. Indeed, the *Kruman* court rejected a narrow definition of "conduct" as "[t]he precise acts that caused injury," and instead adopted a broader definition of "conduct" as "acts that are illegal under the Sherman Act," that is, the international price-fixing conspiracy. *Kruman*, 284 F.3d at 398. The complaint in this case alleges an international price-fixing conspiracy among the vitamin companies, and appellees "do not contest that the vitamin cartel produced substantial effects in the United States" for the purpose of this appeal. Oral Argument Transcript, at 30-31. In light of this concession by appellees, it is unnecessary for us to explore further the precise parameters of the definition of "conduct," since there is no real dispute that the vitamin companies' conduct had "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce. We therefore accept that the "direct, substantial, and reasonably foreseeable effect" requirement under § 6a(1) of FTAIA is met. Additionally, in light of appellees' concession that the vitamin cartel produced substantial effects on U.S. commerce, it is unnecessary for us to address appellees' argument that regulating foreign business transactions would exceed the powers granted to Congress under the Commerce Clause. *See* Appellees' Br. 16-17.

The precise issue presented in this appeal is whether the "gives rise to a claim" requirement under § 6a(2) of FTAIA authorizes subject matter jurisdiction where the defendant's conduct affects both domestic and foreign commerce, but the plaintiff's claim arises only from the conduct's foreign effect. In other words, the question is whether FTAIA precludes actions under the Sherman Act unless a plaintiff shows that the injuries it seeks to remedy arise from the anticompetitive effects of the defendant's conduct on U.S. commerce; or, alternatively, is it enough for a plaintiff to show that the anticompetitive effects of the defendant's conduct on U.S. commerce give rise to an antitrust claim under the Sherman Act by someone, even if not the plaintiff who is before the court.

The Supreme Court first addressed the foreign reach of the Sherman Act in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (Holmes, J.), which held that the Sherman Act did not apply to conduct occurring outside the United States. Eighteen years later, the Court moderated this approach, and held that the Sherman Act authorized jurisdiction over foreign defendants, as long as some of the defendants' conduct occurred within the United States and the conduct affected domestic commerce. *See United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927).

In 1945, in an important opinion by Judge Learned Hand, the Second Circuit held that a federal court has jurisdiction over foreign conduct as long as the conduct was intended to, and actually did, affect U.S. commerce. *See United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) ("*Alcoa*"). Judge Hand said that a "state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." *Id.* at 443. Under *Alcoa*, jurisdiction depends upon whether the conduct had an effect on domestic commerce, not where the conduct took place.

"[C]onduct which has no consequences within the United States" does not come within the reach of U.S. antitrust laws. *Id. Alcoa's* "effects test" is now well accepted. *See, e.g., Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 922 (D.C. Cir. 1984) ("It has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory."); *see also* IA PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 270, at 336 (2d ed. 2000) ("The central point, now well established, is that conduct, whether at home or abroad, can be reached by our antitrust laws when it affects competition within the United States or export competition from the United States."). The Supreme Court expressly embraced the "effects test" in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), stating that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Id.* at 796 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986); *Alcoa*, 148 F.2d at 444).

In 1982, Congress enacted FTAIA, to "encourage the business community to engage in efficiency producing joint conduct in the export of American goods and services." H.R. REP. NO. 97-686, at 2 (1982). As the Supreme Court has noted, "FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy." *Hartford Fire Ins.*, 509 U.S. at 796-97 n.23 (citations omitted). FTAIA was also passed to enact a "single, objective test—the 'direct, substantial, and reasonably foreseeable effect' test" that "will serve as a simple and straightforward clarification of existing American law. . . ." H.R. REP. NO. 97-686, at 2. FTAIA thus endorsed *Alcoa*'s "effects test." *See id.* at 5 ("Since Judge Learned Hand's opinion in [*Alcoa*], it has been relatively clear that it is the situs of the effects as opposed to the conduct, that determines whether United States antitrust law applies.").

Since the enactment of FTAIA, the D.C. Circuit has had one occasion to apply the statute. In *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1086-87 (D.C. Cir. 1998), the court considered whether FTAIA authorizes subject matter jurisdiction over a Caribbean radio station's claim that a competing Caribbean radio station violated the Sherman Act by falsely telling U.S. advertisers that its own radio signal reached the entire Eastern Caribbean so that the advertisers would believe that it alone could fulfill their advertising needs. The precise question was whether the complaint by a foreign plaintiff against a foreign defendant adequately alleged that the latter's anticompetitive conduct had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, as required by FTAIA's first prong. This court found that the anticompetitive conduct of the defendant radio station harmed the U.S. advertisers who had to pay higher prices because of it. We stated: "In this context it appears that antitrust injury to [the plaintiff] is ultimately a harm to U.S. purchasers of radio advertising. By keeping [the plaintiff] out of the market, [the defendant] denied such purchasers the benefit of competition." *Id.* Thus, we held that FTAIA authorized subject matter jurisdiction in that case.

The decision in *Caribbean* did not expressly address FTAIA's second prong—requiring that the effects of the anticompetitive conduct on U.S. commerce "give[ ] rise to a claim under" the antitrust laws—which is at issue in the instant appeal. However, in the course of addressing the first prong's "direct, substantial, and reasonably foreseeable effect" requirement, the *Caribbean* decision noted that the foreign radio station's "antitrust injury . . . is ultimately a harm to U.S. purchasers of radio advertising." *Id.* This conclusion followed from the facts of that case, in which the foreign company's injury and the U.S. purchasers' injury were two sides of the same coin: the defendant radio station's false representations to its U.S. advertisers had the effect of misleading the U.S. advertisers, and causing them to buy

advertising from the false advertiser at inflated prices; these purchases based on false information were what shut the plaintiff radio station out of the advertising market. Thus, it is possible to read *Caribbean* to have assumed, on the facts of that case, that the effect of the conduct on U.S. commerce gave rise to the plaintiff's claim. If so, *Caribbean* simply did not address the question at issue in the instant case, where the effect of the vitamin companies' conduct on U.S. commerce does not give rise to the plaintiffs' claim for redress.

There is another equally plausible way to read the *Caribbean* decision. Although the foreign plaintiff's loss of opportunity to sell advertising and the higher prices paid by U.S. advertisers were clearly interrelated, the higher prices paid by U.S. advertisers did not cause or give rise to the foreign plaintiff's loss of opportunity to sell advertising. One then could not say that the U.S. effect "gave rise to" the plaintiff's claim. It is thus possible that *Caribbean* impliedly interpreted the "gives rise to a claim" prong of FTAIA to be satisfied even where the U.S. effect does not "give rise to" the foreign plaintiff's claim.

We need not determine which of these two readings of FTAIA's second prong is implied by *Caribbean*. Both interpretations appear plausible. *Compare, e.g., Den Norske*, 241 F.3d at 430 ("[T]he effect on United States commerce in [*Caribbean*] . . . gave rise to the injury suffered by the plaintiff, a competing radio station—that is, exclusion of the plaintiff from the market for United States advertising dollars."), *with id.*, 241 F.3d at 436-37 (Higginbotham J., dissenting) ("[*Caribbean*] did not require that the injury to American advertisers 'give[ ] rise to' the plaintiff's cause of action; its determination that the injury gave rise to 'a' claim was sufficient."). In any event, because *Caribbean* only addressed FTAIA's "direct, substantial, and reasonably foreseeable effect" prong, we hesitate to derive a firm interpretation of the "gives rise to a claim" prong from that

case. The law of the circuit thus leaves unanswered the question whether FTAIA requires that the plaintiff's claim arise from the U.S. effect of the anticompetitive conduct. This is an issue of first impression in this circuit.

1. Circuit Split

As noted above, the Second and Fifth Circuits have split on this very question of statutory interpretation. The District Court in the instant case followed the Fifth Circuit's *Den Norske* decision, which held that the federal antitrust laws do not apply to claims in which the plaintiff's injury does not arise from the conspiracy's anticompetitive domestic effect. *Den Norske*, 241 F.3d at 427. That is, even if a conspiracy results in higher prices in the United States, that domestic effect must "give rise to" the plaintiff's injury. By contrast, the Second Circuit in *Kruman* held that FTAIA allows suit by a plaintiff whose injury does not arise from the conduct's harm to domestic commerce, as long as that conduct's "domestic effect violate[d] the substantive provisions of the Sherman Act." *Kruman*, 284 F.3d at 400. As in the instant case, the "direct, substantial, and reasonably foreseeable effect" prong of § 6a(1) was satisfied in those two cases, and the question at issue was whether the "gives rise to a claim" prong of § 6a(2) was satisfied where the U.S. effect of the conduct did not give rise to the plaintiff's claim.

In the Fifth Circuit's *Den Norske* case, a Norwegian oil corporation conducting business exclusively in the North Sea brought an antitrust conspiracy claim against providers of heavy-lift barge services, alleging that the defendants' conduct inflated the plaintiff's operating costs in the North Sea and also inflated oil prices in the U.S. market. The majority opinion in *Den Norske* interpreted the "gives rise to a claim" prong as demanding that the domestic effect give rise to the plaintiff's claim, not merely to someone's claim. *Den Norske*, 241 F.3d at 427. Because the plaintiff's injury

arose solely from the foreign effect, and not from the domestic effect of the defendant's conduct, the Fifth Circuit found subject matter jurisdiction lacking.

Judge Patrick Higginbotham dissented, writing that he was "not persuaded that when illegal conduct produces these domestic effects, that Congress intended to close the door to a foreign company injured by the same illegal conduct." *Id.* at 431 (Higginbotham J., dissenting). Judge Higginbotham found that the literal text of the words "gives rise to a claim" supported jurisdiction: "The word 'a' has a simple and universally understood meaning. It is the indefinite article. . . . If the drafters of FTAIA had wished to say 'the claim' instead of 'a claim,' they certainly would have." *Id.* at 432. In light of the purpose of FTAIA "to exempt exporting from antitrust scrutiny, not to limit the liability of participants in transnational conspiracies that affect United States commerce," Judge Higginbotham worried that the majority's "interpretation of the FTAIA transforms a safe harbor for American exporters into a boon for foreign cartels that restrain commerce in the United States." *Id.* at 433, 434. Judge Higginbotham emphasized the deterrence rationale animating the Sherman and Clayton Acts, and feared that global conspiracies that affect U.S. commerce could be inadequately deterred in the absence of suits by foreign plaintiffs:

> Conspirators facing antitrust liability only to plaintiffs injured by their conspiracy's effects on the United States may not be deterred from restraining trade in the United States. A worldwide price-fixing scheme could sustain monopoly prices in the United States even in the face of such liability if it could cross-subsidize its American operations with profits from abroad. Unless persons injured by the conspiracy's effects on foreign commerce could also bring antitrust suits against the conspiracy, the conspiracy could remain profitable and undeterred.

Id. at 435.

In the Second Circuit's *Kruman* case, buyers and sellers at foreign auctions filed suit against the two largest auction houses, Christie's and Sotheby's, alleging that the auction houses had conspired to fix prices in the United States and abroad for their services as auctioneers, and had inflated commissions. In addressing this claim, the Second Circuit explained that FTAIA is an amendment to the Sherman Act, rather than to the Clayton Act, and, as such, focuses only on the prohibition of a defendant's anticompetitive conduct, rather than on what injury a plaintiff must suffer to bring suit. Thus, the court reasoned, the argument that FTAIA limits liability to injury arising out of the conduct's domestic effect conflates the Clayton Act, to which a plaintiff's injury is relevant, and the Sherman Act, to which only a defendant's conduct is relevant. *See Kruman*, 284 F.3d at 397-99. The court then interpreted the "gives rise to a claim" language as requiring only "that the domestic effect violate the substantive provisions of the Sherman Act," rather than "that the domestic effect give rise to an injury that would serve as the basis for a Clayton Act action." *Id.* at 400. The Second Circuit read Congress' use of the indefinite article in "gives rise to a claim" to mean that "[t]he 'effect' on domestic commerce need not be the basis for a plaintiff's injury, it only must violate the substantive provisions of the Sherman Act." *Id.*

The Second Circuit also relied on policy considerations in interpreting FTAIA. In line with its view that FTAIA governs what conduct by a defendant is regulated by the Sherman Act, rather than which plaintiffs can bring suit, the court reasoned that

> when anticompetitive conduct is directed at both foreign and domestic markets, the success of an anticompetitive scheme in foreign markets may enhance the effectiveness of an anticompetitive scheme in the domestic market. When a foreign scheme magnifies the effect of the domestic scheme, and plaintiffs affected only by the foreign scheme have no remedy under our laws, the perpetrator of the scheme may have a greater incentive to pursue both the foreign scheme and the domestic scheme rather than the domestic scheme alone. Our markets suffer when the foreign scheme is not deterred because the domestic scheme may have a greater chance of success when it is supplemented by the foreign scheme.

Id. at 403. Thus, the Second Circuit found that "[o]ur markets can benefit from the additional deterrence of conduct affecting foreign markets." *Id.* (citing *Pfizer*, 434 U.S. at 313-15).

2. FTAIA's Language: "Effect" that "Gives Rise to a Claim"

Appellants' and appellees' arguments regarding the meaning of FTAIA's "gives rise to a claim" language largely correspond to the reasoning adopted in the Second Circuit's and the Fifth Circuit's opinions, respectively. On the Fifth Circuit's restrictive view of FTAIA, the statute allows suit only where the plaintiff is injured by the U.S. effects of the anticompetitive conduct. *Den Norske*, 241 F.3d at 427. On the Second Circuit's less restrictive view, the statute also allows suit where the plaintiff is injured in foreign commerce by anticompetitive conduct whose "domestic effect . . . violates the Sherman Act," even if the domestic effect of the conduct does not injure the plaintiff. *Kruman*, 284 F.3d at 401.

Appellants make two arguments about the language of FTAIA that we reject. First, echoing the Second Circuit, appellants argue that the Fifth Circuit's restrictive interpretation of "gives rise to a claim" renders superfluous the concluding provision of FTAIA, which states that, if the Sherman Act applies only because the conduct affects "export commerce or export commerce with foreign nations, of a

person engaged in such trade or commerce in the United States," 15 U.S.C. § 6a(1)(B), then it applies "to such conduct only for injury to export business in the United States," *id.* § 6a. *See* Appellants' Br. 22-23; *Kruman*, 284 F.3d at 396; *Den Norske*, 241 F.3d at 432 n.5 (Higginbotham, J., dissenting). In other words, if subsections 1 and 2 of FTAIA already provide that the Sherman Act applies only where the U.S. effect gives rise to the plaintiff's injury, why would Congress need to add the final proviso that, regarding injury to export commerce, the Sherman Act only applies to injury to U.S. export commerce?

We think that there is a reading of the final proviso of FTAIA that would not render it superfluous, even if one were to adopt the Fifth Circuit's and the District Court's restrictive interpretation of "gives rise to a claim." The final proviso could be intended to clarify that, although subsection 1(B) speaks of a "person engaged in" export commerce, the Sherman Act does not extend to *all* injury sustained by such a person as a result of the defendant's anticompetitive conduct, but, rather, only to injury to his export business sustained within the United States. In other words, the proviso precludes an exporter from suing for injury to some aspect of his export business suffered outside the United States. *See* IA AREEDA & HOVENKAMP, *supra*, ¶ 262, at 360 (explaining that the final proviso "is designed to make clear that a foreign firm operating an export business in the United States continues to be protected by the antitrust laws with respect to that business but not with respect to its operations outside the United States"). This limitation would not render the final proviso superfluous under an interpretation of subsection 2 requiring that the plaintiff be injured by the conduct's domestic effect to be able to sue.

Second, appellants place significance on the fact that, in providing that the Sherman Act shall not apply to foreign commerce "unless . . . such conduct" has a U.S. effect that

"gives rise to a claim," Congress chose the word "unless" rather than the phrase "except to the extent that." Appellants contend that "unless" enables the conduct itself to be actionable so long as the U.S. effect is present, whereas except to the extent that" would make the Sherman Act apply only to the extent that the conduct that causes the U.S. effect also gives rise to the plaintiffs' claim. *See* Appellants' Br. 17-19. This is overreading. Like the District Court, we are unconvinced that "unless" and "to the extent that" would have such different meanings in this statute.

At bottom, however, we agree with appellants that § 6a(2) supports subject matter jurisdiction in this case. Although both the Second Circuit and the Fifth Circuit found the "gives rise to a claim" language of § 6a(2) to be plain in opposite ways, we find that the language does not clearly resolve the question whether "a claim" means the plaintiff's claim. The Fifth Circuit's view that "a claim" plainly refers to the plaintiff's claim must depart from the literal language—"gives rise to a claim"—and substitute the words "gives rise to the plaintiff's claim" in order to reach the *plain meaning* to which the court subscribes. The Second Circuit construes broadly Congress' use of the indefinite article in "a claim," such that "a claim" really means "civil action . . . by the federal government to enforce or prevent a substantive violation of the Sherman Act pursuant to 15 U.S.C. § 4"; hence, the words "gives rise to a claim" mean that the conduct's domestic effect "only must violate the substantive provisions of the Sherman Act." *Kruman*, 284 F.3d at 399-400. We think that this interpretation of the words "a claim" gives short shrift to § 6a(2)'s explicit requirement that the domestic effect "give[ ] rise to a claim"—in other words, the language is far from clear as to whether that requirement can be satisfied merely by a violation of the Sherman Act, rather than by antitrust injury to the plaintiffs or others who could bring a claim under the provisions of the Clayton Act that create a cause of action for Sherman Act violations.

Our view of the statute falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former. We hold that, where the anticompetitive conduct has the requisite effect on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce. The anticompetitive conduct itself must violate the Sherman Act and the conduct's harmful effect on United States commerce must give rise to "a claim" by someone, even if not the foreign plaintiff who is before the court. Thus, the conduct's domestic effect must do more than give rise to a government action for violation of the Sherman Act, but it need not necessarily give rise to the particular plaintiff's (private) claim. This interpretation has the appeal of literalism. *Cf. Den Norske*, 241 F.3d at 432 (Higginbotham, J., dissenting) ("The word 'a' has a simple and universally understood meaning. . . . If the drafters of FTAIA had wished to say 'the claim' instead of 'a claim,' they certainly would have.").

Although the language of § 6a(2) does not plainly resolve this case, we believe that our holding regarding the jurisdictional reach of FTAIA is a [sic] faithful to the language of the statute. We reach this conclusion not only by virtue of our literal reading of the statute, but also in light of the statute's legislative history and underlying policies of deterrence, which we address in parts A.4. and A.5., *infra*. We first consider the Second Circuit's structural argument in support of its less restrictive view of § 6a(2).

3. FTAIA's Structure

Appellants adopt the Second Circuit's structural argument—namely that, because FTAIA amended the Sherman Act rather than the Clayton Act, FTAIA only speaks to the question what conduct is prohibited, not which plaintiffs can sue. *See* Appellants' Reply Br. 6-7; *Kruman*, 284 F.3d at 397-400. Because FTAIA is an amendment to the Sherman Act,

this structural argument deems Congress in FTAIA to have addressed only the Sherman Act's prohibition of anti-competitive conduct, putting out of view the Clayton Act's conferral of a cause of action on those injured by Sherman Act violations. Appellants argue: "Since the focus of the FTAIA is on the defendants' conduct, which is regulated by the Sherman Act, it is this conduct alone that violates the Sherman Act. To require that the injury of domestic purchasers be the basis for the injury suffered by Plaintiffs . . . improperly imports a concept applicable to Section 4 of the Clayton Act." Appellants' Reply Br. 6-7.

This argument is plausible but ultimately unconvincing. The Clayton Act, which gives plaintiffs a cause of action under the Sherman Act, was in effect at the time that FTAIA was enacted, and FTAIA speaks explicitly of "giv[ing] rise to a claim under" the Sherman Act. The concept of a claim arising under the Sherman Act is clearly one that is present in the Clayton Act's conferral of a cause of action on those injured by Sherman Act violations. It is thus equally plausible to think that Congress referred to *both* prohibited conduct and plaintiffs' injury, importing concepts from both the Sherman and Clayton Acts, in *making* the nexus of "conduct," "effect," and "claim" the key to FTAIA. The view that FTAIA must be taken to refer only to defendants' conduct tends to ignore the fact that FTAIA does refer on its face to the conduct's effect giving rise to a claim, which arguably refers to a plaintiff's injury. Congress may well have imported a concept from the Clayton Act in amending the Sherman Act, notwithstanding appellants' and the Second Circuit's assumption of categorical precision on Congress' part.

The Second Circuit's heavy reliance on this argument led to its rather expansive holding to the effect that: "Rather than require that the domestic effect give rise to an injury that would serve as the basis for a Clayton Act action, subsection 2 of the FTAIA only requires that the domestic effect

violate the substantive provisions of the Sherman Act." *Kruman*, 284 F.3d at 400. According to the Second Circuit, "a violation of the Sherman Act is not predicated on the existence of an injury to a plaintiff. In fact, the only civil action that can be brought directly under the Sherman Act is one by the federal government to enforce or prevent a substantive violation of the Sherman Act pursuant to 15 U.S.C. § 4." *Id.* at 399. The Second Circuit thereby held that violation of the Sherman Act is sufficient to meet the "gives rise to a claim" requirement of subsection 2. In the Second Circuit's view, the words "a claim" in FTAIA mean an action by the government, not a private claim. The Second Circuit justified this view in a footnote, with three arguments: that the definition of the words "a claim" does not exclude this meaning, *id.* at 400 (citing BLACK'S LAW DICTIONARY 240 (7th ed. 1999)); that FTAIA's specific reference to "a claim under the provisions of sections 1 to 7 of this title" means a claim brought *directly* pursuant to the Sherman Act, *id.*; and that Congress has not exclusively used the word "claim" to refer to a private action for damages, *id.* (citing the Federal Trade Commission Act, 15 U.S.C. § 45(a)(3), which gives the FTC "the power to enforce the substantive provisions of the FTCA regardless of whether a plaintiff has suffered injury").

While we acknowledge that the words "a claim" do not necessarily exclude a government action, the usual meaning of "a claim" is a private action. Thus, unlike the Second Circuit, we do not think that violation of the Sherman Act is necessarily the same thing as "giv[ing] rise to a claim" under it. Furthermore, the concept of "giv[ing] rise to a claim" may well be a concept from the Clayton Act, which creates a private cause of action for Sherman Act violations. As noted above, we believe that, in order to satisfy FTAIA, a plaintiff must show that the anticompetitive conduct violates the Sherman Act and that the conduct's U.S. effect gives rise to someone's claim under it. As the Second Circuit itself noted,

"[t]he existence of a Sherman Act violation does not depend on whether anyone has actually suffered an injury. Conduct may violate the Sherman Act but not be actionable under section 4 of the Clayton Act because it did not cause injury." *Kruman*, 284 F.3d at 397 (citing *Indian Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1419 (7th Cir. 1989)). "The 'mere presence' of a per se violation under Sherman Act § 1 'does not by itself bestow on any plaintiff a private right of action for damages,' which is a 'gift of section 4 of the Clayton Act.'" II AREEDA & HOVENKAMP, *supra*, § 337c, at 313 (quoting *Indian Grocery*, 864 F.2d at 1419). And "while actual injury is required to seek treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, a plaintiff may bring an antitrust action seeking prospective injunctive relief under section 16 of the Clayton Act for conduct violating the Sherman Act without suffering an actual injury." *Kruman*, 284 F.3d at 397 (citing 15 U.S.C. § 26; *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 243 (1980); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969)). But the Sherman Act may be enforced by the government even when no private plaintiff claims actual or threatened injury. *See* 15 U.S.C. § 4 ("The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys . . . to institute proceedings in equity to prevent and restrain such violations.").

We hold that the words "a claim" in subsection 2 of FTAIA refer to a private action, not merely a government action to enforce the Sherman Act. In other words, "giv[ing] rise to a claim" means giving rise to someone's private claim for damages or equitable relief. To satisfy this requirement, the plaintiff must allege that some private person or entity has suffered actual or threatened injury as a result of the U.S. effect of the defendant's violation of the Sherman Act. In the instant case, the conspiracy's U.S. effects did allegedly injure

and did give rise to the claim of some private entities—namely the domestic plaintiffs who filed suit along with the foreign plaintiffs against the vitamin companies.

4. Legislative History

Both appellants and appellees argue that FTAIA's legislative history supports their respective readings of the statute. Parts of the report from the House Committee that drafted FTAIA suggest that plaintiffs injured by the U.S. effects of the anticompetitive conduct may sue, which of course is consistent with the restrictive view of FTAIA's jurisdictional reach. However, there is much in the legislative history to suggest that foreign plaintiffs injured solely by the foreign effects of the anticompetitive conduct may sue, so long as the conduct also harms U.S. commerce. This legislative history supports the less restrictive view of FTAIA's jurisdictional reach, consistent with the position advanced by appellants and endorsed by the Second Circuit. What is most noteworthy is that the presence of legislative history that is consistent with the restrictive view does not (when read in context) denigrate or exclude the less restrictive view, whereas the less restrictive view includes within it the view that plaintiffs harmed by the U.S. effects can sue. This leads us to conclude that the legislative history as a whole supports the less restrictive interpretation of FTAIA that would allow plaintiffs injured by the conduct's foreign effects to bring suit even where the conduct's U.S. effects do not give rise to the plaintiff's claim.

Appellees argue that the following passage from the House Report demonstrates that Congress intended for the Sherman Act to apply only in cases where the plaintiff's injury arose from anticompetitive effect on U.S. commerce:

> The Committee did not believe that the bill reported by the Subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from

> conduct with no anticompetitive effects in the domestic marketplace. Consistent with this conclusion, the full Committee added language . . . to require that the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States. . . [I]t is sufficient that the conduct providing the basis of the claim has had the requisite impact on the domestic or import commerce of the United States. . . .

H.R. REP. NO. 97-686, at 11-12. This passage states that the U.S. "'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws," which is consistent with appellees' restrictive view that the plaintiffs' injury must arise from the conduct's U.S. effect. However, the sentences that immediately follow make clear that "it is sufficient that the conduct providing the basis of the claim has had the requisite impact on" U.S. commerce, which supports appellants' broader view of the statute's "gives rise to a claim" requirement. Indeed, the "[t]his does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States" language, which follows immediately after the discussion of the restrictive view, strongly suggests that Congress did not intend to exclude the less restrictive basis for subject matter jurisdiction under FTAIA.

Under the heading "Imports and Purely Foreign Transactions," the House Report states:

> A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws. . . . [T]here should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or

> a domestic competitor. . . . It is thus clear that wholly foreign transactions as well as export transactions are covered by the [FTAIA], but that import transactions are not.

Id. at 9-10. This passage also suggests that the restrictive view of the statute does not exclude the less restrictive interpretation. On the one hand, the antitrust laws do not extend to "wholly foreign transactions," such as a transaction between two foreign firms. On the other hand, when the passage is read as a whole, this restriction seems to be contemplated only where there is no "direct, substantial and reasonably foreseeable effect on domestic commerce." This implies that where there *is* such an effect, jurisdiction over foreign transactions is proper. This surely does not support appellees' view of the statute.

Parts of FTAIA's legislative history plainly support the broader view of the statute. For example, the House Report states that

> the domestic "effect" that may serve as the predicate for antitrust jurisdiction . . . must be of the type that the antitrust laws prohibit. . . . For example, a plaintiff would not be able to establish United States antitrust jurisdiction merely by proving a *beneficial* effect within the United States, such as increased profitability of some other company or increased domestic employment, when the plaintiff's damage claim is based on an extra-territorial effect on him of a different kind.

H.R. REP. NO. 97-686, at 11. The focus here seems to be on whether the conduct's domestic effect violates the antitrust laws, rather than on whether the conduct's domestic effect gives rise to the plaintiff's claim. This passage suggests that the plaintiff need only allege that the defendant's conduct actually had an effect on the domestic market and that such effect violated the antitrust laws. But more tellingly, in the

course of explaining that a plaintiff whose "damage claim is based on an extraterritorial effect" cannot establish jurisdiction where the conduct has a "*beneficial* effect within the United States," the passage implicitly assumes that a plaintiff whose claim is based on a foreign effect *can* establish jurisdiction where the conduct has a *harmful* effect within the United States. This example addresses the situation in which the same conduct has both domestic and foreign effects, and clearly assumes that the plaintiff's claim does not arise from the conduct's U.S. effect. It specifies that the hypothetical beneficial U.S. effect could be "increased profitability of some other company or increased domestic employment," which obviously could not give rise to a claim under the antitrust laws. But significantly, this example does not assume that the fact that the claim arises from something other than the U.S. effect precludes subject matter jurisdiction. Rather, it is clearly the fact of the U.S. effect being beneficial—and therefore the absence of harmful effect under the "effect" prong—that would render jurisdiction improper. This passage thus suggests that the plaintiff can invoke jurisdiction where the anticompetitive conduct's U.S. effect does not give rise to the plaintiff's claim, as long as the conduct has a harmful, not beneficial, effect on U.S. commerce.

In another passage, the House Report states:

> Any major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction. For example, if a domestic export cartel were so strong as to have a "spillover" effect on commerce within this country—by creating a world-wide shortage or artificially inflated world-wide price that had the effect of raising domestic prices—the cartel's conduct would fall within the reach of our antitrust laws.

> Such an impact would, at least over time, meet the test of a direct, substantial and reasonably foreseeable effect on domestic commerce.

H.R. REP. NO. 97-686, at 13. This suggests that Congress intended for subject matter jurisdiction to exist over the conduct of an international cartel that had an effect on domestic commerce, even if the plaintiff's claim does not arise from that domestic effect. Again, the focus for subject matter jurisdiction purposes here is on whether the defendant's conduct has "the requisite impact on United States commerce," rather than whether the plaintiff in particular was injured by that impact. This passage's example of a domestic export cartel, which presumably directs its anticompetitive conduct to foreign markets, but whose conduct also has a "'spillover' effect on commerce within this country" exemplifies this point, because such a cartel's conduct would give rise to claims by foreign and domestic plaintiffs. In understanding the conduct of such a cartel to be likely to "fall within the reach of our antitrust laws," nothing in this passage restricts that reach to suits *only* by the domestic plaintiffs injured by the conduct's spillover effects. Admittedly, nothing in this passage explicitly allows suits by plaintiffs injured abroad by a "world-wide shortage or artificially inflated world-wide price" rather than by the domestic spillover effects. But we think that given the clear concern here with the *conduct* that creates the world-wide shortage or price inflation that in turn creates domestic spillover effects, it would be counter-intuitive and arbitrary to read Congress to intend to limit jurisdiction to only the subset of claims brought by plaintiffs injured by the spillover effects of the conduct at issue. Since the same conduct injures both foreign plaintiffs and domestic plaintiffs, and it is clearly the conduct that Congress aims to reach with our antitrust laws, it is reasonable to read Congress as envisioning suits by any plaintiffs who would enable our antitrust laws to reach and deter that conduct.

The House Report makes this point explicit:

> The intent of the Sherman and FTC Act amendments in H.R. 5235 is to exempt from the antitrust laws *conduct* that does not have the requisite domestic effects. This test, however, does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States—*e.g.*, price fixing not limited to the export market—would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The *conduct* has requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad. *Cf., e.g., Pfizer Inc., et al. v. Government of India, et al.*, 434 U.S. 308 (1978). Foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do.

Id. at 10. Explicitly envisioning recovery for plaintiffs who "suffer economic injury abroad," this passage seems to support appellants' less restrictive reading of the statute. But appellees point out that this passage, which seems to allow recovery by foreign plaintiffs injured abroad as long as the conduct has the "requisite domestic effects," also expressly states that "[f]oreign purchasers should enjoy the protection of our antitrust laws in the *domestic* marketplace" (emphasis added). This sentence suggests that foreign plaintiffs can sue under the antitrust laws for injury suffered in the domestic market. Arguably, this statement lends some support to appellees' restrictive view of the statute, but not much.

In sum, there is much in the legislative history that supports the *less restrictive view* of FTAIA's jurisdictional reach. There are isolated statements that are consistent with the restrictive view, but they are never offered to denigrate or exclude the less restrictive view of the statute. This is telling, we think, for if Congress intended to reject the less restrictive

view of FTAIA's jurisdictional reach, there was absolutely no reason to discuss this possible basis for subject matter jurisdiction along with the restrictive view. We therefore conclude that the less restrictive view of jurisdiction is consistent with a literal interpretation of § 6a(2), and this interpretation is perfectly consistent with the legislative history.

5. Deterrence

The Supreme Court's decision in *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), which was issued before Congress enacted FTAIA, is cited approvingly in the legislative history to FTAIA. *See* H.R. REP. NO. 97-686, at 10. *Pfizer* therefore may offer some clues as to Congress' intent in enacting FTAIA.

In *Pfizer*, the Supreme Court articulated policy reasons for holding that a foreign plaintiff was entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff. Noting that one purpose of § 4 of the Clayton Act is "to deter violators and deprive them of 'the fruits of their illegality,'" the Supreme Court reasoned that denying a foreign plaintiff injured by an antitrust violation the right to sue "would permit a price fixer or a monopolist to escape full liability for his illegal actions" and "would lessen the deterrent effect" of the antitrust laws. *See Pfizer*, 434 U.S. at 314-15 (citations omitted). Moreover,

> [i]f foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of

> their conduct, American consumers are benefitted by the maximum deterrent effect of treble damages upon all potential violators.

Id. at 315.

On this deterrence logic, the Second Circuit in *Kruman* refuted the view that suits by domestic plaintiffs injured by a global conspiracy's domestic effects could adequately enforce our antitrust laws. The Second Circuit noted that, when a foreign anticompetitive scheme enhances the success of a domestic scheme, the perpetrator would have a greater incentive to pursue the global scheme, which would ultimately harm U.S. consumers if a plaintiff harmed only by the foreign effect of a global scheme had no U.S. remedy. *See Kruman*, 284 F.3d at 403 (citing *Pfizer*, 434 U.S. at 313-15). Judge Patrick Higginbotham's dissent in *Den Norske* similarly emphasized that allowing foreign plaintiffs to sue would protect U.S. consumers by deterring perpetrators from engaging in global conspiracies that harm U.S. markets. *See Den Norske*, 241 F.3d at 435 (Higginbotham, J., dissenting). Judge Higginbotham, following *Pfizer*, reasoned that a global price-fixing scheme could sustain monopoly prices in the United States even in the face of domestic liability, since the profits from abroad would subsidize the U.S. operations. "Unless persons injured by the conspiracy's effects on foreign commerce could also bring antitrust suits against the conspiracy, the conspiracy could remain profitable and undeterred." *Id.*

We find this deterrence reasoning, drawn from *Pfizer*, and amplified in Judge Higginbotham's opinion in *Den Norske*, most compelling. The less restrictive interpretation of the "gives rise to a claim" language of FTAIA, allowing suits by foreign plaintiffs injured by the foreign effects of a global conspiracy, serves "the United States' narrow interest in vigorous domestic competition" better than the restrictive interpretation disallowing such suits. *Id.* at 438-39. *Pfizer*'s

concern was that denying a foreign plaintiff injured by an antitrust violation a remedy under our antitrust laws would permit a price fixer to escape full liability for his conduct, which would lessen the deterrent effect of the antitrust laws. This concern applies squarely to this case. Disallowing suits by foreign purchasers injured by a global conspiracy because they themselves were not injured by the conspiracy's U.S. effects runs the risk of inadequately deterring global conspiracies that harm U.S. commerce. Suits only by those injured by the U.S. effects of a conspiracy may not provide sufficient deterrence; a conspirator could expect that illegal profits abroad would offset his liability in the U.S., leaving the conspirator with an incentive to engage in global conspiracy. Allowing suits by those injured solely in foreign commerce, where the anticompetitive conduct also harmed U.S. commerce, forces the conspirator to internalize the full costs of his anticompetitive conduct.

Even assuming, *arguendo*, that the antitrust laws are only intended to protect selfish national interests, suits by foreign purchasers harmed solely by a conspiracy's foreign effects are necessary to protect U.S. commerce from global conspiracies. This reasoning is also supported by FTAIA's legislative history, which notes: "As the Supreme Court pointed out in *Pfizer*, . . . to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons." H.R. REP. NO. 97-686, at 10.

We are persuaded that, if foreign plaintiffs could not enforce the antitrust laws with respect to the foreign effects of anticompetitive behavior, global conspiracy would be under-deterred, since the perpetrator might well retain the benefits that the conspiracy accrued abroad. There would be an incentive to engage in global conspiracies, because, even if

the conspirator has to disgorge his U.S. profits in suits by domestic plaintiffs, he would very possibly retain his foreign profits, which may make up for his U.S. liability. In any case, the profitability of the global conspiracy would depend on the uncertainties of foreign antitrust enforcement. The U.S. consumer would only gain, and would not lose, by enlisting enforcement by those harmed by the foreign effects of a global conspiracy. We think that *Pfizer* supports this view and that the citation to *Pfizer* in the legislative history of FTAIA suggests that Congress meant to endorse it as well.

6. Conclusion on Subject Matter Jurisdiction

On the basis of the foregoing, we conclude that the less restrictive view of FTAIA's jurisdictional reach, allowing subject matter jurisdiction in this case, is what Congress meant to achieve. The District Court erred in dismissing the foreign plaintiffs' federal antitrust claims for lack of subject matter jurisdiction, since under the less restrictive interpretation, the foreign plaintiffs can establish that the global conspiracy's "direct, substantial, and reasonably foreseeable effect" on domestic commerce "gives rise to a claim" under the antitrust laws.

B. Standing

Appellees contend that, even if subject matter jurisdiction is proper, the case should nonetheless be dismissed because the foreign purchasers lack standing. Because the District Court concluded that it lacked subject matter jurisdiction over the foreign plaintiffs' claims, it declined to address the standing issue. Although the District Court did not rule on the issue, it was fully presented below, as well as before this court. Appellants ask this court to remand the case so that the District Court may examine the issue in the first instance, or alternatively, to find that they have standing.

While the District Court's failure to rule on the issue of standing "might be thought to warrant a remand, so that the district court [may] consider the matter in the first instance, the Supreme Court has instructed the courts of appeals to decide for themselves whether the party seeking judicial review has standing, even if the issue was not decided below. . . ." *Found. on Econ. Trends v. Lyng*, 943 F.2d 79, 82 (D.C. Cir. 1991) (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990)). We are thus "required to address the issue [of standing] even if the courts below have not passed on it. . . ." *FW/PBS*, 493 U.S. at 230 (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969)). "[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review'. . . ." *FW/PBS*, 493 U.S. at 231 (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (citing *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934))).

To meet the constitutional requirements of standing under the Clayton Act, an antitrust plaintiff must establish "injury-in-fact or threatened injury-in-fact caused by the defendant's alleged wrongdoing." *Andrx Pharms., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 806 (D.C. Cir. 2001) (citing *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 (1983)). The foreign purchasers have constitutional standing. They allege that they suffered injury-in-fact when they paid inflated prices for vitamins directly to the defendants. This injury was allegedly caused by defendants' conspiracy to fix vitamin prices around the world. There is no dispute that the foreign plaintiffs in this case have been injured by paying inflated prices for vitamins.

In addition, an antitrust plaintiff must establish "antitrust injury," that is, "'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA*

Petroleum Co., 495 U.S. 328, 334 (1990) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). Appellees argue that the plaintiffs' injuries "are not 'injury of the type the antitrust laws were intended to prevent,' because those laws do not forbid the fixing of prices in the markets in which Plaintiffs purchased vitamins, but only in U.S. commerce." Appellees' Br. 42 (citation omitted). We disagree.

In this case, plaintiffs allege that the defendants engaged in a global conspiracy that had an effect on U.S. and foreign commerce. The antitrust laws do not merely forbid price-fixing in U.S. commerce, but rather forbid price-fixing that harms U.S. commerce. *See, e.g., Laker Airways*, 731 F.2d at 922 ("It has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory."); *Alcoa*, 148 F.2d at 443-44; *cf. Pfizer*, 434 U.S. at 314 ("The fact that Congress' foremost concern in passing the antitrust laws was the protection of Americans does not mean that it intended to deny foreigners a remedy when they are injured by antitrust violations."). Thus, the antitrust laws forbid the fixing of prices in foreign markets where that conduct harms U.S. commerce. Where defendants' global conspiracy harms U.S. commerce, the mere fact that the foreign purchasers bought vitamins solely in foreign markets does not mean that the foreign purchasers lack standing to sue.

In *Brunswick*, the Supreme Court explained that, to establish "antitrust injury," the injury should be "'the type of loss that the claimed violations'" of the Sherman Act "'would be likely to cause.'" *Brunswick*, 429 U.S. at 489 (quoting *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 125 (1969)). The foreign purchasers of vitamins here were injured by conduct that violated the Sherman Act—a global price-fixing conspiracy. The foreign plaintiffs' paying of inflated prices in foreign commerce was loss of the type that violation

of the Sherman Act would be likely to cause. Moreover, the arguments that have already persuaded us that, where anticompetitive conduct harms domestic commerce, FTAIA allows foreign plaintiffs injured by anticompetitive conduct to sue to enforce the antitrust laws similarly persuade us that the antitrust laws intended to prevent the harm that the foreign plaintiffs suffered here. The foreign purchasers' injury therefore must be deemed to be "of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendant's conduct unlawful." *Brunswick*, 429 U.S. at 489. Appellants can therefore establish "antitrust injury."

In addition, we must consider the following additional *Associated General Contractors* factors to determine whether appellants are "proper plaintiffs": "the directness of the injury, whether the claim for damages is 'speculative,' the existence of more direct victims, the potential for duplicative recovery and the complexity of apportioning damages." *Andrx Pharms.*, 256 F.3d at 806 (citing *Associated Gen. Contractors*, 459 U.S. at 542-45). The foreign plaintiffs allegedly purchased vitamins at inflated prices directly from the defendants, and their injury arose from defendants' alleged conspiracy to inflate prices. The injury is direct and the claim for damages is not speculative. Allowing the foreign plaintiffs to sue does not risk duplicative recovery or complex damage apportionment.

Appellees finally argue that "there is a large body of 'more appropriate plaintiffs,'" namely the "[h]undreds of U.S. plaintiffs, as well as a class of domestic purchasers," who have sued the defendants. Appellees' Br. 44. But these domestic plaintiffs have not been harmed more directly by the foreign effects of the conspiracy than the foreign purchasers, and appellees do not suggest that the domestic plaintiffs can seek to recover for the same injury that the foreign plaintiffs suffered. The domestic plaintiffs are not more direct victims

of defendants' conduct than the foreign plaintiffs, since the foreign plaintiffs have been injured just as directly as the domestic plaintiffs as a result of the defendants' conduct. Furthermore, for the reasons already explained, the foreign plaintiffs play an important role in the deterrence of the global conspiracy, a role that cannot be filled adequately by the domestic plaintiffs alone. Therefore, the foreign plaintiffs are proper plaintiffs to bring suit in this case.

We conclude that the foreign plaintiffs in this case have standing to bring their federal antitrust claims.

C. Supplemental Jurisdiction

Appellants contend that, after the District Court dismissed the foreign plaintiffs' federal antitrust claims for lack of subject matter jurisdiction, it erred in declining to exercise supplemental jurisdiction over the foreign plaintiffs' foreign law claims pursuant to 28 U.S.C. § 1367. Appellants argue that "the district court has original subject matter jurisdiction over the claims of the domestic plaintiffs under the Sherman Act, and consequently, should have exercised supplemental jurisdiction over the claims of the foreign plaintiffs." Appellants' Br. 27-28.

This court reviews the District Court's decision not to exercise supplemental jurisdiction for abuse of discretion. *See Diven v. Amalgamated Transit Union Int'l & Local 689*, 38 F.3d 598, 601 (D.C. Cir. 1994). 28 U.S.C. § 1367 provides that, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III." 28 U.S.C. § 1367. Under 28 U.S.C. § 1367, "the District Court has supplemental jurisdiction over related claims when it has original jurisdiction over the initial claim." *Harris v. Sec'y, U.S. Dep't of Veterans Affairs*, 126 F.3d 339, 346

(D.C. Cir. 1997). "When the District Court has dismissed claims properly before it, it retains discretion to decide whether or not to dismiss other claims as to which it may exercise supplemental jurisdiction." *Id.* The District Court "may decline to exercise supplemental jurisdiction over a claim" if, for example, "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). But "[i]f the district court dismissed the underlying claim on jurisdictional grounds, then it could not exercise supplemental jurisdiction." *Saksenasingh v. Sec'y of Educ.*, 126 F.3d 347, 351 (D.C. Cir. 1997).

When the District Court dismissed the foreign plaintiffs' underlying federal antitrust claim on jurisdictional grounds, it had no discretion to exercise supplemental jurisdiction at all over the foreign plaintiffs' foreign law claims. Appellants' assumption that the District Court's remaining jurisdiction over the *domestic* plaintiffs' claims can serve as the basis of supplemental jurisdiction over the foreign plaintiffs' foreign law claims is implausible, and appellants cite no cases to support this assumption. When the District Court dismissed the foreign plaintiffs' claims on jurisdictional grounds, the remaining original jurisdiction over the domestic plaintiffs' claims was irrelevant to the exercise of supplemental jurisdiction over the foreign plaintiffs' foreign law claims. The dismissal of the foreign plaintiffs' federal antitrust claims on jurisdictional grounds precluded the District Court from exercising supplemental jurisdiction over any of the foreign plaintiffs' additional claims over which the court did not have original jurisdiction.

We recognize that the District Court has already articulated reasons that counsel against exercising supplemental jurisdiction, such as comity, efficiency, and the novelty and complexity of the issues of foreign law involved. The posture of the case has now changed, however, because we reverse the District Court's decision on subject matter jurisdiction

and vacate its judgment against appellants. On remand, the District Court will have original jurisdiction over the foreign plaintiffs' federal antitrust claims. Therefore, the District Court must consider anew whether to exercise its discretion to accept supplemental jurisdiction over the foreign plaintiffs' foreign law claims. But the District Court still retains discretion to decline to exercise supplemental jurisdiction over the foreign law claims pursuant to 28 U.S.C. § 1367.

III. Conclusion

For the reasons stated above, we reverse the District Court's decision, vacate the judgment against appellants, and remand the case for further proceedings consistent with this opinion.

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting:

I disagree with the majority's interpretation of the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a, and, consequently, with its disposition of this appeal.[1] The majority decides whether a court has jurisdiction over claims asserted by a plaintiff in one action by reference to a hypothetical claim another party could, perhaps, raise in some other proceeding. This seems a peculiar notion. The more natural reading of the statutory language, I believe, is the narrower one adopted by the district court below and by the Fifth Circuit in *Den Norske Stats Oljeselskap AS v. HeereMac VOF*, 241 F.3d 420 (5th Cir. 2001), under which the phrase "gives rise to a claim" refers to the claim advanced by the plaintiff in the action before the court. This reading, to me, reflects the Congress's "unambiguously expressed intent" under *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). It is also consistent with the legislative history that the majority cites.

The Fifth Circuit's narrower construction is unambiguously supported by the House Report's declaration that "the 'effect' providing the jurisdictional nexus must also be the basis *for the injury alleged* under the antitrust laws." H.R. Rep. 97-686, at 11-12 (emphasis added); *see* maj. op. at 23-24. The plain meaning of this statement is not undercut, as the majority contends, by the two sentences that follow; they simply explain that, so long as "the basis of the claim has had the requisite impact on the domestic or import commerce of the United States,"[2] the claim does not fail simply because "the impact of the illegal conduct" is not "experienced by the

[1] I nonetheless agree with the majority's determination that the district court lacked discretion to exercise supplemental jurisdiction once it had dismissed all of the appellants' claims under United States law. *See* maj. op. at 34-36.

[2] Notably, the word "claim" in the quoted language refers to the specific claim asserted by the injured party.

injured party within the United States." H.R. Rep. No. 97-686, at 12; *see* maj. op. at 24. Another excerpt the majority quotes similarly explains that "[f]oreign purchasers should enjoy the protection of our antitrust laws in the *domestic* marketplace, just as our citizens do" so long as "the conduct has the requisite effects within the United States, even if some purchasers *take title* abroad or *suffer economic injury* abroad." *See* H.R. Rep. No. 97-686, at 10 (quoted in maj. op. at 27) (emphasis added). Taken together, these two excerpts make clear that neither the situs of the injury nor the nationality of the claimant is jurisdictionally dispositive so long as there is a sufficient domestic impact or effect to satisfy subsection (1) of the FTAIA. Neither excerpt purports to eliminate the requirement in subsection (2) that such domestic impact give rise to the claimed injury wherever and by whomever felt. Other of the majority's citations likewise relate to the first prong of the jurisdictional test, in subsection (1), and so are of no assistance in construing the second prong of the test set out in subsection (2). *See* maj. op. at 24-26 (quoting H.R. Rep. No. 97-686, at 9-10, 11, 13). Finally, the Report expressly relies, as the majority observes, on the United States Supreme Court's decision in *Pfizer v. Government of India*, 434 U.S. 308 (1978), but only for the broad proposition that "[t]o deny foreigners a recovery could *under some circumstances* so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons." H.R. Rep. No. 97-686, at 10 (quoted in maj. op. at 30) (emphasis added). The Report does not suggest the deterrence policy discussed in *Pfizer* justifies expanding jurisdiction beyond the limits expressed in subsection (2) of the FTAIA.

Finally, I believe that our decision in *Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998), cannot be construed to support the majority's interpretation of the FTAIA. As a textual matter, the

court in *Caribbean* addressed only subsection (1) of the FTAIA, with nary a mention of subsection (2). Even were we to presume that the court *sub silentio* considered the second prong of the jurisdictional test, the plaintiffs' allegations plainly show that, notwithstanding the majority's contrary assertion, *see* maj. op. at 14, the alleged domestic effect did in fact give rise to the foreign plaintiff's anti-trust claim. In *Caribbean Broadcasting* the court found the foreign plaintiff had adequately alleged that (1) the defendants engaged in "anticompetitive conduct"—"namely, that the defendants made fraudulent misrepresentations to advertisers and sham objections to a government licensing agency in order to protect their monopoly" over FM radio advertising in "the market for English-language radio broadcast advertising in the Eastern Caribbean"; (2) "U.S. customers in the relevant market suffered antitrust injury, to wit, they paid excessive prices for advertising because of the unlawful actions of [the defendants]"; and (3) the foreign plaintiff "was and remains foreclosed from selling advertising to many of those U.S. companies that had purchased advertising time from [the defendant radio broadcaster]." 148 F.3d at 1087. Thus it is clear that the defendants' fraudulent anticompetitive conduct had the effect of causing U.S. companies to advertise only with the defendants and that this effect gave rise to the foreign plaintiff's claim for lost customers.

In sum, because I believe that the plain language in subsection (2) of the FTAIA expressly limits jurisdiction to a claim which itself arises from the domestic antitrust effect required under subsection (1) of the statute, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA COURT
SEPTEMBER TERM, 2003

[Filed September 11, 2003]

No. 01-7115

EMPAGRAN S.A., *et al.*,
Appellants,

v.

F. HOFFMAN-LAROCHE, LTD., *et al.*,
Appellees.

BEFORE: EDWARDS, HENDERSON AND ROGERS, *Circuit Judges*

ORDER

Upon consideration of appellees' petition for rehearing filed February 19, 2003, the supplement thereto, and the responses, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ _____
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
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EMPAGRAN S.A., *et al.*,
Appellants,

v.

F. HOFFMAN-LAROCHE, LTD., *et al.*,
Appellees.

BEFORE: GINSBURG, *Chief Judge*, AND EDWARDS, SENTELLE,* HENDERSON,* RANDOLPH,* ROGERS, TATEL, GARLAND,** AND ROBERTS,** *Circuit Judges*

ORDER

Appellees' petition for rehearing en banc, the supplement thereto, and the responses have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ _____
Michael C. McGrail
Deputy Clerk

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* Circuit Judges Sentelle, Henderson, and Randolph would grant the petition for rehearing en banc.

** Circuit Judges Garland and Roberts did not participate in this matter.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 00-1686 (TFH)

EMPAGRAN S.A., *et al.*,
Plaintiffs,

v.

F. HOFFMAN-LAROCHE, LTD., *et al.*,
Defendants.

HOGAN, *District Judge*

MEMORANDUM OPINION

Pending before the Court is the Joint Motion of Certain Defendants to Dismiss the Amended Class Action Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).[1] Upon careful consideration of defendants' Joint Motion to Dismiss, plaintiffs' opposition,

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[1] The Joint Motion to Dismiss was filed by defendants Hoffman-La Roche, Inc., Roche Vitamins, Inc., BASF Corporation, Rhone-Poulenc Animal Nutrition Inc., Rhone-Poulenc, Inc., Takeda Chemical Industries, Ltd., Takeda Vitamin & Food USA, Inc., Daiichi Pharmaceutical Co., Ltd.; Daiichi Pharmaceutical Corporation, Daiichi Fine Chemicals, Inc., Eisai USA, Inc., Eisai Inc., Akzo Nobel Chemicals B.V., Akzo Nobel Inc., Lonza Inc., Bioproducts Inc., Degussa-Huls Corporation, EM Industries, Inc., Mitsui & Co., Ltd., Nepera, Inc., Reilly Industries, Inc., Sumitomo Chemical America, Inc., Tanabe USA, Inc., and UCB Chemicals Corporation. This Motion has also been adopted by Chinook Group, Ltd., Cope Investments Ltd., DuCoa, L.P., DCV, Inc., UCB S.A., Eisai Co., Ltd., Hoechst Marion Roussel, S.A., Rhone-Poulenc S.A., Sumitomo Chemical Co., Ltd., Degussa AG, Merck KgaA, E. Merck, F. Hoffman-La Roche, Ltd., BASF Aktiengesellschaft, Lonza AG, Alsuisse Group Ltd., and Lonza Inc.

defendants' reply, the arguments presented at the May 23, 2001 hearing, the Sumitomo defendants' post-hearing submission, the Empagran plaintiffs' reply to the Sumitomo brief, and the entire record herein, this Court will grant the Joint Motion to Dismiss with respect to the foreign plaintiffs' federal antitrust claims and defer ruling on the Motion with respect to the domestic plaintiffs' federal antitrust claims pending the domestic plaintiffs' supplementation of their factual allegations with respect to the jurisdictional and standing issues. In addition, the Court will grant defendants' Joint Motion to Dismiss Counts Two and Three of the Amended Complaint.

I. BACKGROUND

Plaintiffs in this case represent foreign corporations domiciled in Ecuador, Panama, Australia, Mexico, Belgium, the United Kingdom, Indonesia, and the Ukraine, as well as two United States corporations—The Procter & Gamble Manufacturing Co. and The Procter & Gamble Co. headquartered in Ohio. Plaintiffs are seeking damages and injunctive relief under the antitrust laws of the United States, the antitrust laws of the relevant foreign nations, and international law for defendants' alleged conspiracy to fix prices, allocate market shares, and commit other unlawful practices "designed to inflate the prices of various vitamins sold to plaintiffs and other purchasers both within and outside the United States." Amend. Compl. at ¶ 1.

Plaintiffs propose to bring this action on behalf of themselves and as representatives of the following classes: (1) domestic purchasers, that is, "all persons or entities domiciled in the United States who directly purchased Class Vitamins from any defendant or its co-conspirators from January 1, 1988 to February, 1999, for delivery outside the United States, excluding all governmental entities, defendants, their co-conspirators, and their respective subsidiaries and affiliates"; and (2) foreign purchasers, that is, "all persons and

entities domiciled outside the United States who directly purchased Class Vitamins from any defendant or its co-conspirators from January 1, 1988 through February, 1999, for delivery outside the United States, excluding all governmental entities, defendants, their co-conspirators and their respective subsidiaries and affiliates." *Id.* at ¶ 96.

II. DISCUSSION

In their Joint Motion to Dismiss, defendants make the following arguments for dismissal: (1) this Court lacks subject matter jurisdiction under the federal antitrust laws to remedy plaintiffs' injuries, because the injuries they seek to redress were allegedly sustained in transactions that lack any direct connection to U.S. commerce; (2) plaintiffs lack standing under the federal antitrust laws to assert their claims because they seek to remedy injuries sustained outside United States commerce and thus fall outside the class of persons whom the Sherman Act is designed to protect; (3) the claims of the domestic plaintiffs are duplicative of claims previously asserted in another action pending in our Court in the *Vitamins Antitrust Litigation* and should thus be dismissed; and (4) the Court should decline to exercise supplemental jurisdiction over plaintiffs' foreign law claims and should dismiss plaintiffs' claims for violations of customary international law for failure to state a claim upon which relief may be granted.

A. Subject Matter Jurisdiction

Defendants argue that this Court lacks subject matter jurisdiction over plaintiffs' claims and plaintiffs have failed to state a claim under the federal antitrust laws, because plaintiffs have not alleged that their injuries were sustained in U.S. commerce as the direct, substantial, and reasonably foreseeable results of anti-competitive conduct by the defendants. Jt. Mot. at 4. Plaintiffs, on the other hand, contend that their allegations of a "global" conspiracy that

operated domestically as well as internationally suffice to state a federal antitrust claim and establish this Court's jurisdiction over the Amended Complaint.

The critical question in this case is whether allegations of a global price fixing conspiracy that affects commerce both in the United States and in other countries gives persons injured abroad in transactions otherwise unconnected with the United States a remedy under our antitrust laws. The Sherman Act has been held to reach conduct abroad only if the conduct was intended to have, and did have, significant effects within the United States. *Kruman v. Christie's Internat'l PLC*, 129 F. Supp. 2d 620, 624 (S.D.N.Y. 2001); *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) ("Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986) ("The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce."). In fact, in 1982, Congress enacted the Foreign Trade Antitrust Improvements Act ("FTAIA") for the purpose, among others, of "exempt[ing] from the United States antitrust law conduct that lacks the requisite domestic effect, even where such conduct originates in the United States or involves American-owned entities abroad." *Id.* The FTAIA provides in pertinent part that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless . . . such conduct has a direct, substantial and reasonably foreseeable effect . . . on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations" and "such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section." 15 U.S.C. § 6(a). Therefore, under federal antitrust law, to establish subject matter jurisdiction over this action, plaintiffs must allege that the conduct

causing their injuries resulted in a "direct, substantial, and reasonably foreseeable effect on U.S. commerce." *Kruman*, 129 F. Supp. 2d at 625. In addition, plaintiffs must also allege that the injuries they seek to remedy "arise" from an anticompetitive effect of defendants' conduct on U.S. commerce. *Id.* In other words, the effect providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. *Id.* Given these standards, the Court would certainly have jurisdiction to provide redress for injuries suffered in consequence of overt acts in furtherance of the conspiracy, such as the imposition of fixed prices, that occurred in the United States, because those acts would both have occurred and have had effects here; but this Court would only have jurisdiction over plaintiffs' alleged injuries, which were suffered in consequence of overt acts that occurred outside this country, if those acts, either individually or perhaps collectively had direct, substantial and reasonably foreseeable effects within the United States that caused the injuries seeking redress here. *Id.* at 625-26.

The problem here is that although plaintiffs generally allege that the defendants' price fixing behavior had direct, substantial, and reasonably foreseeable effects on U.S. commerce, see Amend. Compl. ¶¶ 1-4 (describing defendants' conspiratorial and price fixing actions both within the United States and abroad, including meetings and agreements among the defendants, many of which took place within the United States), they propose to bring this action only on behalf of domestic and foreign purchasers who directly purchased Class Vitamins from defendants or their co-conspirators "for delivery outside the United States." Plaintiffs have not alleged that the precise injuries for which they seek redress here have the requisite domestic effects necessary to provide subject matter jurisdiction over this case. Plaintiffs argue that the jurisdictional nexus is provided solely by the global nature of the defendants' conduct. In plaintiffs' view, the territorial effect of that conduct is irrelevant.

However, the existing caselaw does not support plaintiffs' position. *See, e.g.*, *Kruman*, 129 F. Supp. 2d at 626-27 (dismissing complaint for lack of subject matter jurisdiction despite the fact that "meetings in which the conspiracy was formed or continued and acts in furtherance of the conspiracy occurred both in the United States and elsewhere," where conduct that allegedly injured plaintiffs "took place abroad"); *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6, 8 (2d Cir. 1981) ("actionable aspect" of anticompetitive restraint is not location of the alleged anticompetitive conduct, but an "anticompetitive effect upon American commerce"); *In re Copper Antitrust Litig.*, 117 F. Supp. 2d 875, 887 (W.D. Wis. 2000) (holding that plaintiff injured as a result of defendants' manipulation of the London Metal Exchange could not rely on defendants' conduct in the United States to establish subject matter jurisdiction: "it is irrelevant that some of defendants' conduct took place in the United States. It was not the conduct in the United States that caused plaintiffs' injuries"); *McElderry v. Cathay Pac. Airways Ltd.*, 678 F. Supp. 1071, 1077 (S.D.N.Y. 1988) ("[A]n anticompetitive effect on United States commerce is required for jurisdictional nexus, regardless whether there was anticompetitive conduct in the United States."). Allegations of a worldwide conspiracy do not suffice under the applicable caselaw to establish the necessary direct, substantial and reasonably foreseeable effect on U.S. commerce required to establish this Court's jurisdiction. *See e.g.*, *Lantec, Inc. v. Novell*, No. 2:95-CV-97-ST 2000 U.S. Dist. LEXIS 19905, at *18 (D. Utah, Sep. 15, 2000) (rejecting contention by foreign plaintiffs that subject matter jurisdiction exists under the FTAIA when injuries suffered in foreign markets are "inextricably intertwined" with injuries inflicted on the domestic market," because plaintiffs failed to allege that defendants' "actions toward the [plaintiffs] had a substantial effect on the domestic market"); *Kruman*, 129 F. Supp. 2d at 625-26 (rejecting argument that transnational nature of

auction market was sufficient to establish court's jurisdiction, because relevant conduct for purposes of measuring U.S. effects was not the "transnational price fixing conspiracy" but rather "[t]he precise acts that caused injury," *i.e.* "the imposition of charge for auction services at levels determined or affected by the illicit agreement" and although "[s]ome of those acts occurred here . . . [s]ome—those of which plaintiffs in these cases complain—took place abroad"); *Den Norske Stats Oljeselskap AS v. HeereMac VOF*, 241 F.3d 420, 428 (5th Cir. 2001) (holding that court lacked subject matter jurisdiction over plaintiff's claim, despite the fact that plaintiff had alleged that the market allocation scheme had affected the price for heavy-lift barge services in the Gulf of Mexico, because the allegedly anticompetitive prices charged for heavy-lift barge services in the Gulf of Mexico did not "give rise to" the plaintiff's claim, which was based on injuries sustained in purchasing heavy-barge services in the North Sea).

Plaintiffs argue that Congress intended only to limit recovery under the FTAIA to conduct that had some domestic effect and that it did not intend to limit the Court's jurisdiction to cases where plaintiffs' injuries involved those domestic effects. To support this assertion, plaintiffs contend that by using the word "unless" rather than "except to the extent that" when referring to the domestic effects requirement, Congress allowed the entire range of conduct with some domestic effect to be actionable, and did not limit courts to injuries tied to these effects.[2] However, plaintiffs

[2] Plaintiffs make a similar argument with respect to the legislative history of the FTAIA, which makes the Sherman Act applicable "if" the alleged restraints on export trade have a direct and substantial effect on U.S. commerce. Plaintiffs argue that if Congress had intended to make the FTAIA applicable only to particular injuries with these domestic effects, it would have said that jurisdiction exists "to the extent that" or "insofar as" the requisite U.S. effects are found, rather than "if" the requisite effects are found.

cite no caselaw to support this argument and the caselaw cited by defendants strongly refutes this contention. Moreover, the Court is not convinced that "if" and "to the extent that" carry such a different meaning in the context of this statute. Plaintiffs' brief relies almost exclusively on these types of linguistic arguments, as well as several quotations from the dissents of cases cited by defendants.

In fact, plaintiffs acknowledged at the May 23, 2001 hearing that no court has ever interpreted the federal antitrust laws to reach wholly foreign transactions such as those alleged in this case; however, plaintiffs contend that fairness necessitates that this Court expand the scope of the U.S. antitrust laws in order to compensate plaintiffs for defendants' acknowledged wrongdoing. While the Court understands that some, although not all, of these defendants have pled guilty to price fixing activities in violation of United States antitrust laws, the Court cannot expand the scope of the law in order to satisfy these fairness concerns. Plaintiffs may indeed have a remedy against these defendants abroad. However, the issue here is not whether these defendants are in fact guilty of the conduct alleged but whether this Court has jurisdiction over the plaintiffs' claims. Given the state of the law at the present time, the Court cannot find that it has jurisdiction over the foreign plaintiffs' federal antitrust allegations in this action. Therefore, the Joint Motion to Dismiss the foreign plaintiffs' claims brought under federal antitrust laws is granted for lack of subject matter jurisdiction.

However, the Court's ruling with respect to the claims of the foreign plaintiffs does not resolve the issue of whether this Court has jurisdiction over the allegations of The Procter & Gamble Manufacturing Co. and The Procter & Gamble Co., the two domestic plaintiffs in this action. Subject matter jurisdiction may exist over the proposed domestic purchaser class' claims if they purchased the vitamins in interstate

commerce, regardless of the fact that they planned to deliver these vitamins abroad. *See Carpet Group Internat'l v. Oriental Rug Importers Assoc.*, 227 F.3d 62, 75-76 (3d Cir. 2000) ("because the plaintiffs have introduced evidence sufficient to show that the challenged conduct actually occurred in interstate commerce, we conclude that subject matter jurisdiction exists over plaintiffs' Sherman Act claims"). It is unclear from the face of the Amended Complaint whether the purchases at issue with respect to the domestic plaintiffs were made within the United States or abroad. The Amended Complaint says that the Procter & Gamble Co. "suffered injury in the United States," *see* Amend. Compl. at ¶ 22, but no similar allegation is made with respect to The Procter & Gamble Manufacturing Co.; instead with respect to the latter United States company, the Amended Complaint merely states that P&G Manufacturing purchased vitamin B5 from certain defendants or their co-conspirators "for use in foreign countries." *Id.* at ¶ 19. Therefore, the Court will require Procter & Gamble Co. and The Procter & Gamble Manufacturing Co. to supplement their Amended Complaint to provide more detailed factual allegations with respect to how defendants' conduct caused injuries to these two plaintiffs in United States commerce.

B. Standing

Defendants also contend that plaintiffs lack standing in this case, because they have not been injured in United States commerce and therefore fall outside the class of persons whom the Sherman Act is designed to protect. *See* Jt. Mem. at 19-20 (citing, among other cases, *The 'In' Porters, S.A. v. Hanes Printables, Inc.* 663 F. Supp. 494, 499 (M.D.N.C. 1987) ("[T]he concerns of the antitrust laws is the protection of American consumers and American exporters, not foreign consumers or producers."")). By contrast, plaintiffs maintain that they have standing here because their alleged injuries occurred in a global market, which necessarily includes

United States commerce. *See* Pl's Opp. at 19 (citing, among other cases, *Transnor (Bermuda) Ltd. v. BP North Am. Petroleum* ("*Transnor II*"), 738 F. Supp. 1472, 1476 (S.D.N.Y. 1990) ("foreigners have standing to sue under the U.S. antitrust laws if the alleged course of anticompetitive conduct has the requisite impact on U.S. commerce")). Because this Court has concluded that it lacks subject matter jurisdiction over the foreign plaintiffs' claims, it need not resolve the standing issue with respect to these plaintiffs. However, because the Court conceivably may have subject matter jurisdiction over the two domestic plaintiffs' claims, it will address standing with respect to the domestic plaintiffs.

Generally, in order to determine whether a plaintiff has antitrust standing, courts consider the following factors: (1) the causal connection between an antitrust violation and the harm suffered by the plaintiff; (2) the directness of the asserted injury; (3) the risk of duplicative recoveries; (4) the existence of other, more appropriate, plaintiffs; and (5) whether the antitrust laws were designed to provide redress for plaintiffs' injury. *See Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 537-46, 74 (1983). The fifth factor is especially important to an antitrust claim, because "a plaintiff must prove the existence of antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990). For a plaintiff to have suffered an antitrust injury, the Court must determine that the plaintiff "was injured in the relevant market." *De Atucha v. Commodity Exch. Inc.*, 608 F. Supp. 510, 518 (S.D.N.Y. 1985). For "purposes of standing, the relevant market must be the domestic market." *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, No. 97-3257, 1997 WL 732498, at *4 (N.D. Cal. Nov. 19, 1997); *see also Transnor II*, 738 F. Supp. at 1476 ("[O]nly persons or corporations injured while trading in U.S. foreign or domestic

commerce have standing" to bring Sherman Act claims). "Congress did not intend recovery under the antitrust laws by an individual who traded and was injured entirely outside of United States commerce." *Galavan*, 1997 WL 732498, at *4 (quoting *De Atucha*, 608 F. Supp. at 518); *see also In re Microsoft Corp. Antitrust Litig.*, 2001 WL 119908, at *13 (D. Md. Jan. 12, 2001) ("a plaintiff who has not participated in the U.S. domestic market may not bring a Sherman Act claim under the FTAIA").

In this case, plaintiffs allege generally that they have sustained injuries as a direct result of purchases and sales abroad during defendants' worldwide conspiracy to fix prices and exercise global market power over vitamins products. Despite the domestic plaintiffs' nationality, defendants contend that these plaintiffs lack standing because of the foreign nature of their transactions. *See Microsoft*, 2001 WL 118908, at *13 ("The critical question is not the nationality of the plaintiff but the location of the marketplace in which he participated."). The Amended Complaint does not provide sufficient detail with respect to the transactions involving the two United States plaintiffs, so it is unclear whether or not they were competitors or consumers in the U.S. domestic market.[3] Again, the issue is whether these plaintiffs have traded and were injured within or entirely outside of United States commerce. *See De Atucha*, 608 F. Supp. At 518 ("Congress did not intend recovery under the antitrust laws by an individual who traded, and was injured entirely outside of United States commerce."). The Court cannot resolve the standing issue with respect to the domestic plaintiffs until it

[3] The Amended Complaint does state that P&G suffered injury in the United States; however, there is no similar allegation made with respect to the other United States corporation, P&G Manufacturing. Moreover, the allegations with respect to even the former plaintiff are too general and conclusory and require additional detail before this Court can resolve the standing question.

receives their submissions further detailing where their alleged injuries occurred. Therefore, the Court will reserve decision on standing with respect to Procter & Gamble Co. and The Procter & Gamble Manufacturing Co. pending the additions to the Amended Complaint on this issue.

C. Duplicity of Domestic Plaintiffs' Claims

Defendants argue that the two domestic plaintiffs in this case, Procter & Gamble Co. and The Procter & Gamble Manufacturing Co., should be dismissed from this action because they are already parties to *The Procter & Gamble Co., et al. v. BASF Aktiengesellschaft, et al.*, a case originally filed in the Southern District of Ohio and subsequently transferred by the Multi-District Litigation Panel to, and currently pending before, this Court as part of the *In re: Vitamins Antitrust Litigation*. According to defendants, the Ohio lawsuit is premised on the same basic factual allegations as this action and similarly seeks damages in connection with vitamins purchased for delivery abroad. Therefore, defendants reason, the Court should follow the "first-to-file" rule and dismiss the two domestic plaintiffs' claims in this action as duplicative. *See e.g., Washington Area Transit Auth. v. Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980) (affirming dismissal of duplicative action and noting that "for more than three decades the rule in this circuit has been that, '[w]here two cases between the same parties on the same cause of action are commenced in two different Federal courts, the one which is commenced first is allowed to proceed to its conclusion first. . . .'") However, plaintiffs contend that the claims in this case are not identical to those asserted in the Ohio suit; in fact, according to plaintiffs, the Ohio lawsuit pertains only to domestic sales, while this action deals exclusively with foreign commerce. *See* Pl's Opp. at 36 ("The amended complaint in *P&G v. BASF* references international

activities and sales by way of background, but it does not purport to assert claims based upon sales of vitamins for delivery overseas.").

After reviewing the allegations in the Ohio lawsuit and the instant action, the Court finds that plaintiffs are correct that dismissal would not be appropriate on duplicity grounds because plaintiff is not asserting the same claims in two separate actions. *See P&G v. BASF* First Amended Compl. (Def's Exh. A). In addition, plaintiffs are also correct that the first-to-file rule would not apply here because the claims are pending in two cases in this court rather than in two different courts[4]; therefore, to the extent that the claims could be found to belong in one action, consolidation rather than dismissal would be the appropriate result. *See Miller Brewing Co. v. Meal Co., Ltd.*, 177 F.R.D. 642, 644-45 (E.D. Wis. 1998) (holding that "when both cases are pending in the same district—let alone the same judge—consolidation is preferable"); *Walton v. Eaton Corp.*, 563 F.2d 66, 71 (3d Cir. 1977) ("When a court learns that two possibly duplicative actions are pending on its docket, consolidation may well be the most administratively efficient procedure. If the second complaint proves to contain some new matters, consolidation —unlike dismissal of the second complaint without prejudice or staying the second action—will avoid two trials on closely related matters."). The Court will reserve decision on the

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[4] Although the case was originally transferred to this Court only for pretrial proceedings, the parties to that case have subsequently entered into a stipulation that dictates that the case will be "treated for all purposes as if it has been transferred to the D.C. Court pursuant to 28 U.S.C. § 1404(a) and shall not be remanded for trial. . . ." 1/26/01 Stip. and Ord. Re: Personal Jurisdiction and Refiling of Actions ¶ 2. However, according to defendants, the Stipulation does not involve all defendants so the domestic P&G plaintiffs' claims may not be so easily consolidated with this action.

issue of consolidation pending the Court's rulings on subject matter jurisdiction and standing with regard to these domestic plaintiffs.[5]

D. Plaintiffs' Claims Under Foreign and Customary International Law

Defendants argue that even if this Court concludes that it has original jurisdiction over any of plaintiffs' claims, it nevertheless should decline to exercise supplemental jurisdiction over plaintiffs' claims under the "competition laws of the relevant foreign nations." Jt. Mot. at 27. Accordingly, defendants contend that Count Two should be dismissed. Additionally, defendants contend that Count Three should be dismissed because plaintiffs' claims for violations of customary international law do not state a claim upon which relief can be granted.

On the other hand, plaintiffs contend that this Court has original subject matter jurisdiction over the claims of the domestic plaintiffs under the Sherman Act and consequently this Court may exercise supplemental jurisdiction over the claims of the foreign plaintiffs. Moreover, plaintiffs claim that the Alien Tort Claims Act, 28 U.S.C. § 1350, permits a foreign plaintiff to bring an action in a United States federal court for torts in violation of international law.

1. Foreign Law Claims

Title 28 of the United States Code, section 1367, grants district courts jurisdiction to hear claims within the "same case or controversy." 28 U.S.C. § 1367. The standard for supplemental jurisdiction is whether the claims "derive from

[5] Since the Court is dismissing the claims brought by the foreign plaintiffs, it may be more practical for the domestic plaintiffs to consolidate their claims into the Ohio action currently pending before the Court; should the parties agree to consolidation, they should notify the Court as soon as possible.

a common nucleus of operative fact." *United Mine Workers of America v. Gibbs*, 86 S. Ct. 1130, 1138 (1966). The scope of supplemental jurisdiction has been applied to domestic and foreign claims in addition to state and federal claims. *See, e.g., Ortman v. Stanray Corp.*, 371 F.2d 154 (7th Cir. 1967) (holding that doctrine of ancillary jurisdiction applied to determine if district court had jurisdiction to hear claims of foreign patent infringement where court had undisputed jurisdiction to hear claim of U.S. patent infringement arising out of same activities).

However, 28 U.S.C. § 1367(c) enumerates several bases for declining to exercise supplemental jurisdiction: (1) the claim raises a novel or complex issue of law; (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction; (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c)(1)-(c)(4).

Plaintiffs contend that this Court should exercise supplemental jurisdiction over these foreign law claims in order to reduce the inefficiency and redundancy that will occur if the foreign plaintiffs are forced to litigate identical claims and issues in numerous courts around the world. Pl's Opp. at 34. However, both parties appear to agree that there are already a number of lawsuits pending "in numerous jurisdictions around the world," *see* Pl's Opp. at 34 (quoting Motion of Certain Defendants for a Protective Order Concerning Plaintiffs' Requests for Merits Discovery). Therefore, it is unclear how this action would reduce the number of suits or increase efficiency. This Court would certainly lack the power to order that the other actions be dismissed or consolidated; and, given the first-to-file rule, it would seem that this action should be dismissed as duplicative of the other actions since it was presumably filed after these actions. In

any case, it would be more efficient and in the best interests of comity to allow the foreign courts to adjudicate the claims arising out of alleged violations of their own laws. Since these foreign law claims raise novel and complex issues of foreign law, the court has already dismissed all federal claims brought by the foreign plaintiffs for lack of subject matter jurisdiction, and there are comity and efficiency reasons for declining to exercise supplemental jurisdiction over the foreign law claims in this case, the Court will decline to exercise supplemental jurisdiction over plaintiffs' foreign law claims. *See*, *Microsoft*, 2001 WL 118908, at *11 n.8 (declining to exercise any supplemental jurisdiction over foreign law claims). Accordingly, defendants' Joint Motion to dismiss Count Two of the Amended Complaint is granted.

2. Plaintiffs' Claims for Violations of Customary International Law

Defendants also argue for dismissal of the foreign plaintiffs' claims brought under customary international law for failure to state a claim upon which relief may be granted. In order to establish a right to recover damages for violations of customary international law, plaintiffs must show: (1) that there exists a customary international law proscribing the conduct of which they complain and (2) that the law applies to private citizens and not only to state action.

Customary international law is based primarily on "customs and usages of civilized nations, treaties, and other interstate agreements, the decisions of international tribunals, and the decisions of national tribunals." 48 C.J.S. International Law § 5; *see also* Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987). While plaintiffs are correct that the "'law of nations' is not stagnant and should be construed as it exists today among the nations of the world." Pl's Opp. at 26 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984)), courts have held as recently as this year that "no antitrust claim based on

customary international law has been recognized by a U.S. court." *Microsoft*, 127 F. Supp. 2d at 717 ("It is true that competition policy has been widely discussed on a global level. However, the international agreements regarding antitrust law that the foreign plaintiffs identify are voluntary and lack enforcement mechanisms. The dearth of enforceable international antitrust law highlights the inability of the international community to reach a consensus on competition policy. . . . Without general agreement on standards of international antitrust law, there can be no customary international law of antitrust. Therefore, plaintiffs' claim under customary international law fails."); *see also Kruman*, 129 F. Supp. 2d at 627 (rejecting a similar claim and noting that "[p]laintiffs' position, which only recently was rejected in the *Microsoft* case borders on the frivolous. . . . There is no substantial support for the proposition that there is an international consensus proscribing price fixing that fairly might be characterized as customary international law, much less an international consensus that price fixing gives rise to a tort claim on behalf of victims").

Plaintiffs cite no caselaw establishing a customary international law of antitrust.[6] Given the absence of any authority establishing such a cause of action, the Court cannot find that there exists a customary international law proscribing the conduct of which plaintiffs complain in this action. Therefore, it is unnecessary for the Court to reach the issue of whether

[6] Plaintiffs may be correct that the future of global antitrust policy could be in favor of a customary international law proscribing the type of conduct alleged here; certainly, there is some evidence that such an international consensus may be needed in today's world of global economies. However, the law has not yet evolved to this point. A single United States district court cannot enact such an international agreement where none exists. Therefore, although plaintiffs may have predicted the future of the law, they have not stated a cause of action under present international law.

the law requires state action. Accordingly, Count Three of the Amended Complaint should be dismissed for failure to state a claim upon which relief may be granted.

III. CONCLUSION

For the foregoing reasons, defendants' Joint Motion to Dismiss the federal antitrust claims in the Amended Class Action Complaint brought by the foreign plaintiffs is granted. In addition, The Procter & Gamble Manufacturing Co. and The Procter & Gamble Co. will supplement their federal antitrust allegations in the Amended Complaint to provide further detail on the location of the domestic plaintiffs' injuries and the effect of the defendants' conduct, which caused these injuries, on United States commerce.[7] The Court will reserve ruling on the jurisdictional, standing, and consolidation questions with respect to the domestic plaintiffs' federal antitrust claims pending the filing of these more detailed allegations. In addition, the Court will grant defendants' Joint Motion to Dismiss Counts Two and Three of the Amended Class Action Complaint. An order will accompany this Opinion.

June 7th, 2001

/s/ _____
Thomas F. Hogan
United States District Judge

[7] If either domestic plaintiff finds that it cannot allege the necessary facts to establish subject matter jurisdiction and standing in accordance with the Court's legal rulings in this Opinion, that plaintiff should file the appropriate dismissal documents with the Court.

No. 01-7115

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMPAGRAN S.A., *et al.*,
Plaintiffs-Appellants,
v.
F. HOFFMAN-LAROCHE, LTD., *et al.*,
Defendants-Appellees.

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR REHEARING EN BANC

On Appeal from the United States District Court
for the District of Columbia

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IN THE UNITED STATES COURT OF APPEALS
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No. 01-7115

EMPAGRAN S.A., *et al.*,
Plaintiffs-Appellants,
v.
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Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC

STATEMENT OF INTEREST

This brief is submitted in response to the Court's Order of March 7, 2003, inviting the Solicitor General to express the views of the United States.

QUESTION PRESENTED

Whether the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a, provides jurisdiction under the Sherman Act over the claims of a foreign plaintiff injured by a conspiracy having direct, substantial, and reasonably foreseeable anticompetitive effects on United States trade or commerce, when the foreign plaintiff's claimed injury does not arise from those domestic effects.

STATEMENT

1. In the mid-1990s, the United States began investigating global price-fixing and market allocation conspiracies among domestic and foreign manufacturers and distributors of bulk vitamins ("vitamin companies"), in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pursuant to those conspiracies, cartel members sold billions of dollars' worth of vitamins in the United States and around the world. To date, the United States has negotiated plea agreements with twelve corporate defendants and thirteen individual defendants, obtaining fines exceeding $900 million–including the largest criminal fine ($500 million) ever obtained by the Department of Justice under any statute. Moreover, eleven of the thirteen individuals have received sentences resulting in imprisonment, while one defendant awaits sentencing. European Union, Canadian, and Australian authorities similarly have obtained record fines against the vitamin companies.[1]

In the wake of the government's investigation, private parties brought multiple suits against the vitamin companies, seeking treble damages and attorneys' fees (15 U.S.C. 1, 15, 26) stemming from overcharges paid as a result of the price-fixing conspiracy. In settlement of suits by some United States purchasers, the vitamin companies paid hundreds of millions of dollars. *In re Vitamins Antitrust Litig.*, No. 99-197 THF, 2000 WL 1737867 (D.D.C. Mar. 31, 2000). This case

[1] Francisco Peiró, *Commission adopts eight new decisions imposing fines on hard-core cartels*, 1 Competition Policy Newsl. (European Comm'n), Feb. 2002, at 30-34 (over ∈855 million in fines), *available at* http://europa.eu.int/comm/competition/publications/cpn/cpn2002_1.pdf; Australian Competition & Consumer Comm'n, *Federal Court Imposes Record $26M Penalties Against Vitamin Suppliers* (Mar. 1, 2001), *available at* http://203.6.251.7/accc.internet/media/search/view_media.cfm?RecordID=267; Canadian Competition Bureau, *Fines in Order of Magnitude—Competition Act*, *available at* http://strategis.ic.gc.ca/SSG/ct01709e.html.

arises from claims by "foreign corporations domiciled in various foreign countries, who purchased vitamins abroad from the vitamin companies . . . for delivery outside the United States." Pet. App. A6.

2. The district court (Hogan, J.) dismissed the foreign plaintiffs' claims for lack of subject matter jurisdiction, holding that those plaintiffs had "not alleged that the precise injuries for which they seek redress here have the requisite domestic effects necessary to provide subject matter jurisdiction over this case" under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a. *Empagran, S.A. v. F. Hoffman-La Roche, Ltd.*, No. Civ. 001686TFH, 2001 WL 761360, at *3 (D.D.C. June 7, 2001).[2] The district court explained that, although the foreign plaintiffs had alleged that "the conduct causing their injuries

[2] The FTAIA, which in 1982 became Section 7 of the Sherman Act, provides:

> Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> [*Proviso*] If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1) (B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. 6a.

resulted in a 'direct, substantial, and reasonably foreseeable effect on U.S. commerce,'" the plaintiffs had not alleged that "the effect providing the jurisdictional nexus . . . [was also] the basis for the injury alleged under the antitrust laws." *Id.* at *2 (citations omitted).[3]

3. A divided panel of this Court (Edwards, Henderson, and Rogers, JJ.) reversed and remanded. Pet. App. A1-A36. The court observed that "the Second and Fifth Circuits have split" on "the question whether the FTAIA requires that the plaintiff's claim arise from the U.S. effect of the anticompetitive conduct." *Id.* at A13. The court observed (*id.* at A13-A14) that the Fifth Circuit in *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 427 (2001) (*Statoil*), *cert. denied*, 534 U.S. 1127 (2002), held that the FTAIA bars claims in which the plaintiff's injury does not stem from the conspiracy's anticompetitive domestic effects. By contrast, the Second Circuit in *Kruman v. Christie's International PLC*, 284 F.3d 384, 400 (2002), *petition for cert. pending*, No. 02-340 (filed Sept. 3, 2002), held that the FTAIA permits suit when the plaintiff's injury does not arise from the domestic effect of the conspiracy as long as a "domestic effect violate[s] the substantive provisions of the Sherman Act."[4]

The majority adopted a "view of the statute [that] falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former." Pet. App. A19. The majority rejected the plaintiffs' argument–based on *Kruman*, 284 F.3d at 397-400–that the

[3] Because the district court found subject matter jurisdiction lacking, it did not reach the defendants' alternative argument that the foreign plaintiffs lacked antitrust standing. *Empagran S.A.*, 2001 WL 761360, at *5.

[4] The parties in the *Kruman* case have reportedly agreed to settle their case. Brooke Barnes, *Sotheby's, Christie's to Settle Claims by Overseas Customers*, Wall St. J., Mar. 12, 2003, at B2.

"FTAIA only speaks to the question what conduct is prohibited, not which plaintiffs can sue." Pet. App. A20. The majority nonetheless interpreted the phrase "gives rise to a claim" in Section 6a(2) as requiring only that "the conduct's harmful effect on United States commerce must give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." *Id.* at A19.

The majority also relied on the legislative history of the FTAIA and policy considerations to support its expansive interpretation of the Act. Acknowledging that portions of the sole relevant congressional committee report, H.R. Rep. No. 686 (1982), 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 2487 (House Report), support the Fifth Circuit's interpretation of the FTAIA, the majority believed it "most noteworthy . . . that the presence of legislative history that is consistent with the restrictive view does not (when read in context) denigrate or exclude the less restrictive view, whereas the less restrictive view includes within it the view that plaintiffs harmed by the U.S. effects can sue." Pet. App. A23. The majority found "most compelling," however, the prospect that an expansive interpretation of the FTAIA to allow persons like appellants to sue would maximize deterrence of international cartels by "forc[ing] the conspirator to internalize the full costs of his anticompetitive conduct." *Id.* at A20.

The majority further held that the appellants have antitrust standing. Pet. App. A31-A34. The court reasoned that "the arguments that have already persuaded us that, where anticompetitive conduct harms domestic commerce, FTAIA allows foreign plaintiffs injured by anticompetitive conduct to sue to enforce the antitrust laws similarly persuade us that the antitrust laws intended to prevent the harm that the foreign plaintiffs suffered here." *Id.* at A33.

Judge Henderson dissented. Pet. App. A37-A39. She disagreed with the majority's interpretation of the FTAIA,

explaining that, "[n]otably, the word 'claim' in the [Act] refers to the specific claim asserted by the injured party." *Id.* at A37 n.2.

DISCUSSION

A. The Panel Decision Merits En Banc Review

1. The Fifth Circuit in *Statoil* held that "the plain language of the FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a non-domestic market." 241 F.3d at 428. After a certiorari petition was filed in *Statoil*, the Supreme Court invited the Solicitor General to express the views of the United States. In response, the Solicitor General filed an amicus brief on behalf of the United States and Federal Trade Commission taking the position that the Fifth Circuit's decision in *Statoil* correctly interpreted the FTAIA to require that the anticompetitive effects on United States commerce give rise to a plaintiff's claimed injuries. Brief For The United States And The Federal Trade Commission As Amici Curiae, at 10-17, *Statoil ASA v. HeereMac v.o.f.*, No. 00-1842 (*Statoil* Br.)[5] The government's brief also explained that the Fifth Circuit's reading of the Act would not impair effective deterrence of antitrust violations or federal criminal enforcement of the antitrust laws against international cartels. *Id.* at 8-10. The government concluded, moreover, that the Fifth Circuit's decision did not warrant the Supreme Court's attention at that time because the decision was "the first appellate decision to address whether a plaintiff's antitrust claim involving foreign conduct must derive from that conduct's effect on domestic commerce." *Id.* at 5.

[5] For the Court's convenience, we attach as an addendum a copy of the government's amicus brief in *Statoil*. [Addendum omitted.]

Since the filing of the government's *Statoil* brief, two courts of appeals have reached interpretations of the FTAIA that conflict with the Fifth Circuit's decision in *Statoil*. As the panel observed (Pet. App. A4, A13-A14), the Second Circuit in *Kruman* rejected the view that the FTAIA "require[s] that the 'effect' on domestic commerce be the basis for the alleged injury suffered by a plaintiff," and instead held that the FTAIA's "language 'gives rise to a claim' only requires that the 'effect' on domestic commerce violate the substantive provisions of the Sherman Act." 284 F.3d at 399. Moreover, the majority's decision in the present case holds that the FTAIA permits a plaintiff to sue based on foreign injury arising from foreign conduct. That decision sharply contrasts with the Fifth Circuit's decision in *Statoil*, but also differs from the Second Circuit's decision in *Kruman*. See Pet. App. A19 ("Our view of the statute falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former.").

2. The government urges that this Court grant rehearing en banc because the majority's decision deepens a circuit split on an issue of exceptional and recurring importance regarding the scope of the antitrust laws. Fed. R. App. P. 35(b)(1)(B). With increasing frequency, foreign plaintiffs have sued to recover damages arising out of foreign purchases of conspiratorially price-fixed items, when the conspiracy's conduct also affects United States commerce. *Statoil* Br. 7. Indeed, appeals involving the issue whether such suits are permissible under the FTAIA are under submission in the Third and Seventh Circuits. *BHP New Zealand Ltd. v. UCAR Int'l, Inc.*, Nos. 01-3329, 01-3340 & 01-3991 (3d Cir. argued Mar. 11, 2003); *Metallgesellschaft AG v. Sumitomo Corp. of Am.*, No. 00-3700 (7th Cir. argued Sept. 5, 2001). The issue also has been addressed in many district court decisions. Reh'g Pet. 8 n.4 (collecting cases); *Statoil* Br. 7. The United

States expects that similar suits will follow in light of the majority's holding in this case that the FTAIA does not bar such suits.

B. The Panel Majority's Holding Is Inconsistent With The Statutory Text, History, And Purposes

The government continues to adhere to the position set forth in its amicus brief in *Statoil* that the FTAIA bars a private suit when the plaintiff's claim does not arise from the domestic effects of the challenged anticompetitive conduct.

1. It is settled that the Sherman Act extends to foreign conduct with intended and substantial effects on United States commerce, and that the FTAIA provides for jurisdiction under the Sherman Act over a claim by a plaintiff that suffers injury arising from direct, substantial, and reasonably foreseeable anticompetitive effects of foreign conduct on United States commerce, whether the plaintiff is located in the United States or abroad. *Statoil* Br. 11. The panel has embraced the remarkable proposition, however, that the FTAIA allows a suit even when a plaintiff is injured overseas *and* the injury stems entirely from a conspiracy's effects overseas. The panel reached that result by a "literal" reading of the word "a" in Section 6a(2) to mean that "the conduct's harmful effect on United States commerce must give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." Pet. App. A19. Read in context, however, the most natural reading of Section 6a(2)'s requirement that "such effect gives rise to a claim" is that the requisite anticompetitive effects on domestic commerce must give rise to the claim brought by the *particular plaintiff* before the court. *Statoil* Br. 12; cf. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (a plaintiff "cannot rest his claim to relief on the legal rights or interests of third parties").

This interpretation is supported by principles of antitrust injury and standing embedded in the FTAIA. Section 6a(2) of

the FTAIA requires that domestic effects of the conduct in question "give[] rise to a claim" under the Sherman Act. 15 U.S.C. 6a(2). In *Kruman*, the Second Circuit held that because the FTAIA amended the Sherman Act—not the Clayton Act—the FTAIA "only speaks to the question what conduct is prohibited, not which plaintiffs can sue." Pet. App. A20 (citing *Kruman*, 284 F.3d at 397-400). The panel majority correctly rejected that approach because "Congress referred to *both* prohibited conduct and plaintiffs' injury, importing concepts from both the Sherman and Clayton Acts, in *making* the nexus of 'conduct,' 'effect,' and 'claim' the key to FTAIA." *Id.* at A20; see also *Statoil* Br. 12-13.

The majority erred, however, in concluding that the statute requires merely that "*some* private person or entity has suffered actual or threatened injury as a result of the U.S. effect of the defendant's violation of the Sherman Act," Pet. App. A22 (emphasis added), because Congress incorporated antitrust injury and standing concepts in the FTAIA. See House Report at 11 ("[T]he Committee does not intend to alter existing concepts of antitrust injury or antitrust standing."). To have a "claim," a plaintiff must show "antitrust injury"—"injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). A contrary result would "divorce[] antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so." *Id.* at 487.

The FTAIA's focus is on domestic effects of anticompetitive conduct. Its text contains no hint of a statutory purpose to permit recovery where the situs of injury is entirely foreign and the injury exclusively arises from a conspiracy's effect on foreign commerce. Thus, established principles of antitrust injury and standing inform a proper interpretation of the FTAIA's language and require that the

plaintiff–not just someone–have a "claim" under the Sherman Act. Cf. *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (describing zone-of-interest requirement for prudential standing).

2. The majority acknowledges that portions of the FTAIA's legislative history support the Fifth Circuit's interpretation of the Act, Pet. App. A23, A28, but concludes that, on the whole, the legislative history favors an expansive interpretation because nothing in the history affirmatively "denigrate[s] or exclude[s]" an expansive interpretation, *id.* at A23. The majority thus assumes that, in the absence of express legislative history to the contrary, Congress must have intended the more expansive interpretation–a dubious analytical approach to a statute that was prompted in significant part by a perceived need to clarify the limitations of the Sherman Act's reach over international transactions. House Report at 2. The salient point is that nothing in the Act's legislative history speaks to the issue of foreign purchasers whose injuries do not arise from a conspiracy's effects on domestic commerce. The majority's interpretation of what the legislative history "implicitly assumes," Pet. App. A25, is simply unavailing because there is no indication that Congress had in mind the scenario occurring here–foreign plaintiffs suing to recover for alleged overcharges paid in foreign transactions for foreign goods. See *Statoil*, 241 F.3d at 429 n.28 ("Nothing is said about protecting foreign purchasers in foreign markets.") (quoting *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 715 (D. Md. 2001)).

The Supreme Court's decision in *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), provides the relevant context for all of the House Report passages cited by the majority. See House Report at 10 (citing *Pfizer*). *Pfizer* did not address the jurisdictional reach of the antitrust laws. Rather, it held that a foreign government that purchased

goods from United States companies is a "person" "entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff." 434 U.S. at 320. As discussed above, there is no dispute that the FTAIA permits suits by foreign purchasers who are injured by *domestic* anticompetitive effects of illegal conduct. Those plaintiffs, however, are markedly different from foreign purchasers who "bought [goods] exclusively outside the United States" and whose injuries arise exclusively from overseas conduct. Pet. App. A9.

3. a. We further disagree with the majority's reliance (Pet. App. A30) on what it considered a "most compelling" rationale: that its expansive interpretation of the FTAIA is necessary to deter international cartels from harming United States commerce. The majority reasons that allowing foreign plaintiffs to sue for treble damages in U.S. district court for foreign injuries suffered by defendants' foreign conduct "forces the conspirator to internalize the full costs of his anticompetitive conduct." *Ibid.* The paramount purpose of the United States' antitrust laws, however, is to protect consumers, competition, and commerce in the United States. *Pfizer*, 434 U.S. at 314 ("Congress' foremost concern in passing the antitrust laws was the protection of Americans."). Although the Court in *Pfizer* observed that "suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers," *ibid.*, the Court's decision in *Pfizer*, as we have pointed out, involved foreign purchasers injured by anticompetitive *domestic* conduct and effects. The Court did not intimate that the purposes of the antitrust laws would support the availability of a private treble damages action when foreign injury is sustained exclusively as a result of *foreign* conduct.

The Supreme Court has made clear that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co. v.*

Zenith Radio Corp., 475 U.S. 574, 582 (1986). The Department of Justice follows that admonition in prosecuting international cartels by focusing on domestic commerce when calculating fines under the Sentencing Guidelines. See *Statoil* Br. 8-10. Similarly, for private plaintiffs, that admonition is appropriately followed by providing a cause of action only for such plaintiffs–domestic and foreign–who suffer injury from a conspiracy's effect on domestic commerce.[6]

Moreover, policy considerations based on deterrence counsel *against* the panel's expansive interpretation of the FTAIA that permits suits for injuries sustained abroad that arise from foreign conduct. Price-fixing conspiracies are inherently difficult to detect and prosecute. Cooperation by a co-conspirator, through provision of documents or testimony, thus is often vital to law enforcement. To induce such cooperation, the Antitrust Division of the Department of Justice maintains a robust *Corporate Leniency Policy*, 4 Trade Reg. Rep. (CCH) ¶ 13,113 (Aug. 10, 1993), that offers strong incentives to co-conspirators who elect voluntarily to disclose their criminal conduct and cooperate with prosecutors. That policy has proven indispensable in government antitrust enforcement; it is the number one source of leads for breaking up international cartels–including the vitamins cartel that is the subject of this case–that continue to injure American consumers.

Under the policy, the first cooperating corporation (and its officers) may receive amnesty from *criminal* prosecution. 4 Trade Reg. Rep. (CCH) ¶ 13,113 at 20,649-21, 20,649-22. They remain subject, however, to private actions seeking treble damages under 15 U.S.C. 15(a). Thus, potential

[6] The majority's decision also ignores the striking change in the legal landscape since *Pfizer*. Not only has Congress enhanced the penalties available against cartels, but there has been a marked growth in foreign antitrust statutes and enforcement, particularly in the !ast decade. *Statoil* Br. 15-16; Reh'g Pet. 4-5.

amnesty applicants weigh their civil liability exposure when deciding whether to avail themselves of the government's amnesty policy. Without question, "private suits provide a significant supplement . . . to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter Corp. v. Sonotone*, 442 U.S. 330, 344 (1979). The rule adopted by the majority, however, would effect a sea change in the number and type of private actions permitted under the Sherman Act. We are aware of no other country whose antitrust laws provide for treble damages. By permitting suits for treble damages by overseas plaintiffs whose injuries arise from overseas conduct, the majority's decision, if allowed to stand, would create a potential disincentive for corporations and individuals to report antitrust violations and seek leniency under the Corporate Leniency Policy or, when amnesty under the policy is unavailable, to cooperate with prosecutors by plea agreement. The panel's decision thus threatens to impair the ability of the government to seek criminal penalties, and of private parties (whether located here or overseas) to seek treble damages for injuries stemming from a conspiracy's anticompetitive effects on commerce *in the United States*. Such a decrease in effective enforcement of the antitrust laws, therefore, has the potential to weaken deterrence–the opposite of what the panel intended. Pet. App. A28-A31.

b. There are additional countervailing policy reasons to require that a plaintiff's injury arise from a conspiracy's anticompetitive domestic effects. The rule embraced by the majority threatens to burden the federal courts in the United States with suits seeking to recover for injuries sustained abroad and arising exclusively from foreign conduct and foreign anticompetitive effects. Under the panel's decision, the critical inquiry is whether a conspiracy's effect on domestic commerce "give[s] rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." Pet. App. A19. The majority does not explain how that determination is to be made when the party who suffered the

relevant injury is not "before the court." *Ibid.* It is clear, however, that once *any* plaintiff is determined to have a claim arising from an injury sustained by the domestic anti-competitive effects of a conspiracy, the rule embraced by the panel would permit any foreign purchaser to bring suit for treble damages in the district courts of the United States, even when the purchaser is "injured solely by that [conspiracy's] effect on foreign commerce." *Id.* at A5.

We are unaware of any decision pre-dating the FTAIA that permitted such suits. Congress passed the FTAIA to "exempt from the Sherman Act export transactions that did not injure the United States economy," *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 n.23 (1993), and to create a "single, objective test–the 'direct, substantial, and reasonably foreseeable effect' test" to "serve as a simple and straightforward clarification of *existing* American law," House Report, *supra*, at 2 (emphasis added). Congress did not intend the sweeping change brought about by the rule adopted by the majority, which would open the district courts of the United States to suits to recover for injuries suffered abroad solely as a result of a conspiracy's effect on foreign commerce.

CONCLUSION

The Court should grant rehearing en banc.

Respectfully submitted,

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* The Solicitor General is recused in this case.

[ADDENDUM]

[The brief for the government filed by the Solicitor General in *Den Norske Stats Oljeselskap AS v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002), which was attached as an addendum to the Solicitor General's brief, can be found at http//www.usdoj.gov/osg/briefs/2001/2pet/6invit/2000-842.pet.ami.inv.pdf.]